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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SOUTH CAROLINA NATIONAL BANK,
Petitioner,

v.

ALEXIS M. HERMAN,
Secretary of the United States Department of Labor,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Secretary of the United States Department of Labor ("Secretary") is barred under the doctrine of res judicata from bringing a claim, as a representative of the plan, to recover employee benefit plan assets where that claim was settled by a court-certified class of all participants in the plan, as a representative of the plan, in prior litigation.

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

The parties to the consolidated appeals are named in the caption of this petition, except for William A. Fickling, Jr., Bank of South Macon, as trustee under agreement of William A. Fickling, Jr., Self-Employed Retirement Plan, Neva L. Fickling, William A. Fickling III, Jane F. Skinner, Julia C. Fickling, Roy H. Fickling, Claudia F. Fickling, Jane Dru Fickling, Katherine M. Wright, Katherine Darden Wright, Virginia M. Rabun, W&J Capital Company, Ltd., and J&R Capital Company, Ltd.

RULE 29.1 LISTING

Petitioner South Carolina National Bank, now Wachovia Bank, National Association, is a wholly-owned subsidiary of Wachovia Corporation. Petitioner South Carolina National Bank has no non-wholly-owned subsidiary corporations.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS	ii
RULE 29.1 LISTING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	6
The Court of Appeals' Decision to Exempt From the Doctrines of Res Judicata and Release an ERISA Claim to Recover Money Damages on Behalf of a Private Pension Plan When—and Simply Because—the Claim Is Brought by the Secretary of Labor Is Inconsistent With Decisions of This Court, Decisions of Other Circuits, the Intent of Congress in Enacting ERISA, and the Public Policy Interest in the Finality of Litigation	6
A. The Decision Below Conflicts With Decisions of This Court and Other Circuits Recognizing That a Prior Judgment or Settlement on Behalf of a Private Party Bars Subsequent Claims by the Government to the Extent That the Government Seeks Additional Monetary Relief for That Private Party	8
B. The Decision Below Threatens to Impede the Sound Administration of Justice by Undermining Private Parties' Incentives to Settle ERISA Claims	24
CONCLUSION	25

TABLE OF AUTHORITIES

Cases Page

Allen v. McCurry, 449 U.S. 90 (1980) 8
Campbell v. Hall-Mark Elec. Corp., 808 F.2d 775 (11th Cir. 1987) 17, 18
Chicago, Rock Island & Pac. Ry. v. Schendel, 270 U.S. 611 (1926) 6, 9, 10
City of Richmond v. United States, 422 U.S. 358 (1975) 12, 13
Donovan v. Cunningham, 716 F.2d 1455 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984) 17, 18, 19, 20
EEOC v. Cosmair, Inc., 821 F.2d 1085 (5th Cir. 1987) 11
EEOC v. Harris Chernin, Inc., 10 F.3d 1286 (7th Cir. 1993) 7, 11
EEOC v. Huttig Sash & Door Co., 511 F.2d 453 (5th Cir. 1975) 11
EEOC v. Kimberly-Clark Corp., 511 F.2d 1352 (6th Cir.), *cert. denied*, 423 U.S. 994 (1975) 12
EEOC v. United States Steel Corp., 921 F.2d 489 (3d Cir. 1990) 9, 12
FTC v. AMREP Corp., 705 F. Supp. 119 (S.D.N.Y. 1988) 12
Hathorn v. Lovorn, 457 U.S. 255 (1982) 12, 13
In re Imperial Corp. of Am., 92 F.3d 1503 (9th Cir. 1996) 12
Marek v. Chesny, 473 U.S. 1 (1985) 24
Martin v. Consultants & Adm'rs, Inc., 966 F.2d 1078 (7th Cir. 1992) 22
Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 9, 14, 16, 21
Mertens v. Hewitt Assoc., 508 U.S. 248 (1993) 8
Montana v. United States, 440 U.S. 147 (1979) 8, 24
NLRB v. Donna-Lee Sportswear Co., 836 F.2d 31 (1st Cir. 1987) 12
Nevada v. United States, 463 U.S. 110 (1983) 8
New Orleans Steamship Assoc. v. EEOC, 680 F.2d 23 (5th Cir. 1982) 11
Nottingham Partners v. Trans-Lux Corp., 925 F.2d 29 (1st Cir. 1991) 9

TABLE OF AUTHORITIES—Continued

Page

Sam Fox Publ'g Co. v. United States, 366 U.S. 683 (1961) 12, 13
Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) (*en banc*) 17, 21, 22, 23
Southern Pac. R.R. v. United States, 168 U.S. 1 (1897) 25
Truvillion v. King's Daughters Hospital, 614 F.2d 520 (5th Cir. 1980) 11
United States v. Borden Co., 347 U.S. 514 (1954) .. 14, 15, 16
United States v. Bendix Home Appliances, Inc., 10 F.R.D. 73 (S.D.N.Y. 1949) 14
United States v. East Baton Rouge Parish School Bd., 594 F.2d 56 (5th Cir. 1979) 12, 13, 14
Williams v. First Nat'l Bank, 216 U.S. 582 (1910) .. 24

Statutes and Rules

Employee Retirement Income Security Act of 1974,
section 407(d)(6), 29 U.S.C. § 1107(d)(6) 2
section 409(a), 29 U.S.C. § 1109(a) ..... *passim*
section 502(a)(2), 29 U.S.C. § 1132(a)(2) ..... *passim*
section 502(a)(3), 29 U.S.C. § 1132(a)(3) 8
section 502(a)(5), 29 U.S.C. § 1132(a)(5) 2, 7, 8, 16, 18, 20
section 502(e), 29 U.S.C. § 1132(e) 3
section 502(h), 29 U.S.C. § 1132(h) 2, 3, 7, 17
section 504, 29 U.S.C. § 1134 3

Other Materials

18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4454 (1981) .. 9
Judicial Business of the United States Courts 1997 Report of the Director, Tables C-2, C-4 24

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PETITION FOR A WRIT OF CERTIORARI

Petitioner South Carolina National Bank ("SCNB") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *Herman v. South Carolina National Bank*, Nos. 97-6058 and 97-6154 (11th Cir. May 15, 1998).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, reported at 140 F.3d 1413, appears at A. 1a. The Memorandum Opinion of the United States District Court for the Northern District of Alabama, which is not reported, appears at A. 29a. The judgment order of the United States District Court for the Northern District of Alabama and the District Court's order dismissing the Secretary's claims for monetary relief appear at A. 46a and A. 43a, respectively. The order of

the Court of Appeals denying the petitions for rehearing and suggestions for rehearing en banc appears at A. 40a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 15, 1998. A. 1a. The petitions for rehearing and suggestions for rehearing en banc were denied on August 10, 1998. A. 40a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves sections 409(a), 502(a)(2), 502(a)(5) and 502(h) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1109(a), 1132(a)(2), 1132(a)(5), 1132(h). These statutory provisions are set forth at A. 48a-A. 49a.

STATEMENT OF THE CASE

Petitioner SCNB is a national banking association. In 1988, SCNB agreed to serve as trustee of the Charter Medical Corporation Employee Stock Ownership Plan (the "Charter ESOP") in return for a fixed fee. An ESOP is a form of employee benefit plan designed to invest primarily in the stock of its sponsoring company, *see* ERISA § 407(d)(6), 29 U.S.C. § 1107(d)(6), here Charter Medical Corporation ("Charter").

On September 1, 1988, SCNB entered into an agreement to purchase $80 million worth of Charter stock from the company's founder, William A. Fickling, Jr., and related persons (the "Fickling Defendants") at a later date. Charter, in turn, agreed to loan the $80 million purchase price to the ESOP.

The $80 million transaction was scheduled to close in February 1990. At the time, Charter's stock was not publicly traded. Consequently, SCNB hired one of the region's largest financial advisors, Interstate/Johnson Lane Corporation ("Interstate"), to value Charter's stock

as of the date of the proposed purchase. Interstate assigned a value of $43.16 per share, and the transaction closed on that basis.

Unbeknownst to SCNB, however, Charter's stock was worth less than $43.16 per share. The Charter ESOP had overpaid the Fickling Defendants.

As a result, in May 1991, Frances Knop and Millie Smith sued SCNB, Interstate, Charter and others on behalf of an alleged class of all participants in the Charter ESOP (the "*Knop* Action"). The complaint alleged that SCNB had breached its fiduciary duties under ERISA by relying upon the Interstate valuation and, as a result, allowing the Charter ESOP to overpay for the Fickling Defendants' Charter stock. The complaint sought recovery on behalf of the Charter ESOP of all monetary losses that resulted from the overpayment pursuant to section 409(a) of ERISA, 29 U.S.C § 1109(a). R1-8, ¶ 92. Federal jurisdiction over the ERISA claims was invoked under section 502(e) of ERISA, 29 U.S.C. § 1132(e).

As required by section 502(h) of ERISA, 29 U.S.C. § 1132(h), the *Knop* Action plaintiffs served a copy of their complaint on the Secretary of Labor. R7-142-Tab E at 2, ¶ 2. The Secretary thereupon had the right "to intervene in [the] action." ERISA § 502(h), 29 U.S.C. § 1132(h). But the Secretary did not intervene, directly. Instead, she pursued discovery outside of the litigation, invoking her investigative authority under section 504 of ERISA, 29 U.S.C. § 1134. In that connection, the Secretary required SCNB to turn over all contemporaneous documents in its file, including SCNB's attorney-client communications. R7-146 (Second Gantt Aff.) ¶ 12. To induce SCNB to surrender its privileged documents, the Secretary advised SCNB that a plan trustee like SCNB has a common law duty to disclose attorney-client communications to the plan's beneficiaries. The Secretary further asserted that "SCNB may not assert the privilege

vis-a-vis the Secretary of Labor since the Secretary is acting on behalf and in the interests of the plan participants and beneficiaries." R7-142-Tab F.

In March 1992, the parties to the *Knop* Action entered into a proposed settlement agreement. R3-75. The proposed agreement called for Charter (which had agreed earlier to indemnify SCNB and others) to pay more than $12 million in cash to the Charter ESOP and to forgive $30 million of the loan it had made to the ESOP to effect the stock purchase. *Id.* In return, the agreement called for all parties to exchange releases and cross-releases, specifically including releases of all claims for money damages asserted on behalf of the Charter ESOP under section 409(a) of ERISA, 29 U.S.C. § 1109(a). R3-75-15, 17.

Consistent with this arrangement, the district court ordered the defendants to notify all class members of the proposed settlement and to invite all of the ESOP's participants and their representatives to appear and be heard at a fairness hearing. R3-76. The defendants did so and, consistent therewith, specifically notified the Secretary of the fairness hearing and of the invitation to attend. R7-142-Tab J; R7-146 (Second Gantt Aff.) ¶ 16.

At the fairness hearing on April 30, 1992, the district court heard testimony from the parties and from other class members concerning the proposed settlement. The Secretary of Labor, however, did not appear or object. Instead, she sent a letter to the parties stating that, while she did not consider herself bound by a private settlement, she did "not wish to make the chances of settling the Knop Action any less likely . . . ." R7-142-Tab J. Following the hearing, the district court entered Findings of Fact and Conclusions of Law, and an Order and Final Judgment approving the settlement agreement and releases. R4-99, R4-100.

Seven weeks later, the Secretary sent letters to SCNB and to the Fickling Defendants demanding that they

"undo" the $80 million transaction and cause the ESOP to return all shares of Charter stock that it had acquired in the transaction, even though the *Knop* Action settlement decree allowed the ESOP and its participants to keep those shares. R7-142-Tab N. Thereafter, the Secretary filed a civil action of her own against SCNB and the Fickling Defendants. The Secretary alleged that SCNB had breached its fiduciary duty under ERISA by relying upon the Interstate valuation and, as a result, by allowing the Charter ESOP to overpay for the Fickling Defendants' stock. Like the *Knop* Action plaintiffs, who were participants in the ESOP, the Secretary sought recovery of monetary losses from SCNB for the Charter ESOP, pursuant to section 409(a) of ERISA, 29 U.S.C. § 1109 (a). R1-8, ¶ 92; R7-142-Tab O. Unlike the *Knop* Action plaintiffs, the Secretary also sought a variety of equitable remedies designed to prevent future violations of the statute. *See id.*

Subsequently, the Secretary and SCNB entered into a consent order disposing of the Secretary's claims for injunctive and declaratory relief. R8-183. The claim for monetary relief, however, came before the district court on cross-motions for summary judgment. After reviewing those motions, the district court granted SCNB's motion and dismissed the Secretary's claim to recover additional monetary relief from SCNB. A. 43a. In doing so, the district court explained that because the Secretary "seeks to recover the same alleged losses on behalf of the same ESOP under the same section of ERISA and based on the same stock purchase as the participants sought and settled" in the *Knop* Action, her monetary claim against SCNB is barred under the doctrines of representative claim preclusion (res judicata) and release, among others. A. 33a.

The court of appeals reversed. A. 1a. In doing so, the court acknowledged that the Secretary had, in fact, sought recovery for the Charter ESOP of the same alleged monetary losses settled by the *Knop* Action participants

and beneficiaries on behalf of the Charter ESOP. Nonetheless, the court concluded that the settlement decree did not bar the Secretary from suing SCNB again for the same alleged losses. According to the court of appeals, the general rules of res judicata "do[] not apply here" because the Secretary has "national public interests" that "are wholly distinct and separate from those of private litigants . . . ." A. 20a.

REASONS FOR GRANTING THE PETITION

The Court of Appeals' Decision to Exempt From the Doctrines of Res Judicata and Release an ERISA Claim to Recover Money Damages on Behalf of a Private Pension Plan When—and Simply Because—the Claim Is Brought by the Secretary of Labor Is Inconsistent With Decisions of This Court, Decisions of Other Circuits, the Intent of Congress in Enacting ERISA, and the Public Policy Interest in the Finality of Litigation.

This case presents a straightforward question: Whether a final judgment that resolves the purely private interest embodied in an award of money damages to a private party bars the government, under the doctrine of representative claim preclusion (res judicata), from recovering additional money damages for that same private party in a subsequent action. The court of appeals held that the doctrine does not apply when, as here, the government's action seeks to enforce a "federal statute that implicates both public and private interests." A. 22a. That holding, however, conflicts with settled authority of this Court and with precedents adopted by other Circuits recognizing that a final judgment or settlement disposing of a claim for private pecuniary relief bars the government from later seeking additional money damages for the benefit of the same private party. *E.g., Chicago, Rock Island & Pac. Ry. v. Schendel,* 270 U.S. 611, 619 (1926) (where there has been a "previous adjudication[] against the real party in interest" the "government should be held estopped" from bringing suit as a representative of that private party). And this is so even when the government

sues under a statute, such as those statutes dealing with racial or age discrimination, that implicate both public and private interests. *See, e.g., EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993) (private individual's suit bars recovery by the EEOC of backpay, liquidated damages, and reinstatement in his behalf, even though EEOC retains independent right to sue for injunctive relief needed to vindicate the broader public interest). This Court's intervention is necessary to restore uniformity to this important area of federal law and to preserve the integrity of voluntary settlement agreements in federal litigation.

In this case, the res judicata issue surfaced in a dispute arising under ERISA's civil enforcement provisions, including sections 409(a) and 502(a) of ERISA, 29 U.S.C. §§ 1109(a), 1132(a). Section 409(a) of ERISA imposes personal liability on a fiduciary who breaches any of his duties or responsibilities with respect to an employee benefit plan. It provides in relevant part that the fiduciary may be "personally liable to make good to such plan any losses to the plan resulting from each such breach, ..." 29 U.S.C. § 1109(a). A civil action to obtain appropriate relief under section 409(a) of ERISA is authorized under section 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2).

Section 502(a)(2) authorizes four classes of possible plaintiffs to bring a claim for relief under section 409. The claim may be brought "by the Secretary, or by a participant, beneficiary or fiduciary" of the plan. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). If the claim is brought by a participant, beneficiary or fiduciary, "[a] copy of the complaint . . . shall be served upon the Secretary" and the Secretary "shall have the right in [her] discretion to intervene in any [such] action . . . ." ERISA § 502(h), 29 U.S.C. § 1132(h).

In addition, Congress authorized civil actions by the Secretary of Labor, under section 502(a)(5) of ERISA, "(A) to enjoin any act or practice which violates any

provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title . . . ." 29 U.S.C. § 1132(a)(5).[1]

Here, there is no claim by the Secretary for broader equitable relief against SCNB under section 502(a)(5) of ERISA, 29 U.S.C. § 1132(a)(5). The Secretary settled her claims for injunctive and declaratory relief against SCNB. The only disputed claim against SCNB is a claim by the Secretary under section 502(a)(2) of ERISA to recover additional money damages for the Charter ESOP pursuant to section 409(a) of ERISA. In fact, the Secretary has so conceded. R17-169 at 42, 47.

That claim was, as the district court observed, the very same claim, under the very same statutory provisions, to recover the very same losses, as the claim resolved by a class of all Charter ESOP participants in the *Knop* Action. For this reason, as shown below, the Secretary's claim for additional monetary relief from SCNB is barred under the doctrine of res judicata.

A. The Decision Below Conflicts With Decisions of This Court and Other Circuits Recognizing That a Prior Judgment or Settlement on Behalf of a Private Party Bars Subsequent Claims by the Government to the Extent That the Government Seeks Additional Monetary Relief for That Private Party.

Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties or those in privity with them from relitigating claims that were, or could have been raised in that action. *Nevada v. United States*, 463 U.S. 110, 134-35 (1983); *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Montana v. United States*, 440

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[1] This section, and its analog for private litigants, ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), authorize the recovery of equitable relief only, not money damages. *See Mertens v. Hewitt Assoc.*, 508 U.S. 248, 260-61 (1993).

U.S. 147, 153 (1979).[2] "One relationship long held to fall within the concept of privity is that between a nonparty and party who acts as the nonparty's representative." *EEOC v. United States Steel Corp.*, 921 F.2d 489, 493 (3d Cir. 1990). *See generally Chicago, Rock Island and Pac. Ry. v. Schendel*, 270 U.S. 611, 620 (1926) (privity is present in representative actions where "parties nominally different [are], in legal effect, the same"). In other words, "[a] nonparty whose interests have once been represented is not free to relitigate the same interests either in person *or through another representative.*" 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4454, at 462 (1981) (emphasis added).

These bedrock principles of law apply equally here. The *Knop* Action resolved all claims brought by a class of all participants in the Charter ESOP, acting as representatives of the plan, under section 502(a)(2) of ERISA to recover money damages from SCNB on behalf of the plan pursuant to section 409(a) of ERISA. The Secretary brought the very same action, under the very same statutory provisions, to obtain the very same relief. That relief was solely to recover money damages for the plan as a representative of the plan.

Indeed, a party, including the Secretary of Labor, may not, under sections 409(a) and 502(a)(2) of ERISA, seek relief for anyone other than the plan and, in doing so, may not act in a capacity other than as a representative of the plan. This was made abundantly clear in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985). There, this Court stated that section

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[2] The same is true under the doctrine of release, but as a matter of the parties' contract independent from the court's final judgment. *See generally Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 31-32 (1st Cir. 1991) ("It is beyond cavil that a suit can be barred by the earlier settlement of another suit in either of two ways: res judicata or release. The defenses are separate and distinct.") (internal citations omitted).

409(a) of ERISA permits recovery only for "the plan as an entity." *Id.* at 140. The Court explained that "[i]nclusion of the Secretary of Labor [among the persons authorized to sue under section 502(a)(2)] is indicative of Congress' intent that [such] actions . . . be brought in a representative capacity on behalf of the plan as a whole." *Id.* at 142 n. 9.

Because the Secretary's claim against SCNB under sections 409(a) and 502(a)(2) of ERISA was, in fact and in accordance with law, brought in just this capacity, as a "representative . . . on behalf of the plan" to recover losses of the plan, *id.* at 142 n.9, that claim by the Secretary was barred, under the doctrines of res judicata and release, by the prior settlement of the very same action under the very same provisions for the very same relief by a class of all participants in the plan as "representative[s] . . . on behalf of the Plan." Id. at 142 n.9.

This conclusion accords with this Court's decision in *Chicago, Rock Island & Pacific Railway v. Schendel,* 270 U.S. 611. There, the Court reaffirmed and applied the principle that a representative claim, like the Secretary's here, is barred under the doctrine of res judicata by a prior disposition of the represented party's claims in a separate case. *Id.* at 618-22. In doing so, the Court discussed, with approval, an earlier decision expressly recognizing that res judicata applies equally to representative actions brought by the government: "[W]here a suit in the name of the government was brought to enforce the right of a private party, it was held that a prior adverse adjudication . . . in a suit against [the private party] personally, determining the same issues, was available as an estoppel against the government." *Id.* at 619.

This principle plainly controls here. Because a court-certified class of all participants in the Charter ESOP obtained a final judgment disposing of the ESOP's claim for monetary relief pursuant to section 409(a) of ERISA, 29 U.S.C. § 1109(a), "the government should be held

estopped" from relitigating that claim. *See Schendel*, 270 U.S. at 619.

The court of appeals here failed to apply this principle. By doing so, it placed itself directly in conflict with decisions of the First, Third, Fifth, Sixth, Seventh, and Ninth Circuits, all of which have recognized that the government may not relitigate in a representative capacity a private claim that the private party has previously litigated and resolved.

In *EEOC v. Huttig Sash & Door Co.*, 511 F.2d 453 (5th Cir. 1975), the Fifth Circuit held that the dismissal of a private individual's suit for monetary relief precludes the EEOC from asserting monetary claims on behalf of that individual. Although holding that the dismissal did not cut off the EEOC's independent and separate right to enjoin any discriminatory practices of the defendant, the court concluded that "the EEOC would be barred from filing suit . . . on behalf of [a] person who had had his suit adjudicated. Res judicata would prevent such a suit." *Id.* at 456.

To the same effect, the Fifth Circuit later held that "the [EEOC] may not bring a second suit based on the transactions that were the subject of a prior suit by a private plaintiff, unless the [EEOC] seeks relief different from that sought by the individual." *Truvillion v. King's Daughters Hosp.*, 614 F.2d 520, 525 (5th Cir. 1980); *see also EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1091 (5th Cir. 1987); *New Orleans Steamship Assoc. v. EEOC*, 680 F.2d 23, 25 (5th Cir. 1982) (to the same effect). This result necessarily follows, as the Seventh Circuit aptly summarized in *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, because "there is privity between the EEOC and individuals for whom it seeks individual benefits." *Id.* at 1291.

For this same reason—and under a host of different statutory frameworks—other courts have routinely barred the government from recovering monetary relief on behalf

of private persons who earlier recovered or settled the same monetary claim in their own name. *See, e.g., In re Imperial Corp. of Am.*, 92 F.3d 1503, 1509 (9th Cir. 1996) (court-approved settlement of a derivative action on behalf of a failed financial institution to recover losses incurred by that institution as a result of the failure bars a subsequent action by the FDIC to recover the same losses); *EEOC v. United States Steel Corp*, 921 F.2d 489, 496 (3d Cir. 1990) ("when the EEOC seeks to represent grievants by attempting to obtain private benefits on their behalf, the doctrine of representative claim preclusion must be applied"); *NLRB v. Donna-Lee Sportswear Co.*, 836 F.2d 31, 37-38 (1st Cir. 1987) (judgment in private collection action brought by pension fund bars later NLRB claim for recovery of the same alleged amounts); *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1361 (6th Cir.), *cert. denied*, 423 U.S. 994 (1975) (although EEOC remains free to sue for injunctive relief to vindicate the broader public interest in preventing illegal employment discrimination, prior settlement by individual grievants "may well limit the scope of relief that the EEOC may seek" for the settling parties); *FTC v. AMREP Corp.*, 705 F. Supp. 119 (S.D.N.Y. 1988) (Federal Trade Commission's claims which seek compensation or other redress in favor of individuals who have previously settled are barred by res judicata).

But the court of appeals in this case relied upon a different Fifth Circuit decision, *United States v. East Baton Rouge Parish School Board*, 594 F.2d 56 (5th Cir. 1979), plus three decisions of this Court, *Hathorn v. Lovorn*, 457 U.S. 255 (1982), *City of Richmond v. United States*, 422 U.S. 358, 376 n.6 (1975), and *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961). According to the court below, these cases do not bar, under the doctrine of res judicata or release, a government agency from bringing a separate, independent action

on behalf of the public interest in situations analogous to the one here.

To the extent these cases stand for that proposition, however, they are completely inapposite. No one disputes that the Secretary retained her right to sue for broader equitable and injunctive relief on behalf of the public interest. She retained that claim despite the *Knop* Action settlement, and obtained a consent order against SCNB disposing of it. R8-183. The issue here, however, was whether the purely *private* component of the Secretary's lawsuit—her claim under section 502(a)(2) of ERISA "as a representative of the plan" for money damages on behalf of the plan under section 409(a) of ERISA—should proceed where a class of all participants in the plan had earlier disposed of the plan's money damages claim through a court-approved settlement. And, the four cases relied upon by the court of appeals do not address this kind of governmental action, whereas *Schendel, Huttig Sash & Door Co., Harris Chernin, Imperial Corp. of America,* and the other cases cited above squarely do.

Three of the four cases cited by the court of appeals—*City of Richmond v. United States*, 422 U.S. 358, *Hathorn v. Lovorn*, 457 U.S. 255, and *United States v. East Baton Rouge Parish School Board*, 594 F.2d 56—involve claims by the government to enforce the "preclearance" requirement of section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(c), which provides for affirmative approval by the Attorney General, in some circumstances, of certain voting plans. These cases do not involve government claims for monetary relief, much less monetary relief for the benefit of specific voters. Instead, they involve claims to remedy voting procedures on behalf of the larger body politic. The government's claim to protect the body politic's voting rights in these cases is fundamentally different from the purely private claim that the Secretary pursues under section 502(a)(2) of ERISA when she seeks recovery of money damages for "the plan as an entity" under section 409(a) of ERISA as a "repre-

sentative . . . on behalf of the plan." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. at 140, 142 n.9. To the extent *City of Richmond*, *Hathorn* and *East Baton Rouge Parish* have any relevance here, they merely show, as the Fifth Circuit stated in *East Baton Rouge Parish* that "the United States has an interest in enforcing federal [election] law that is independent of any claims of private citizens." *East Baton Rouge Parish*, 594 F.2d at 58.

The same is true for the fourth and final case mistakenly relied upon by the court below, *Sam Fox Publishing Co. v. United States*, 366 U.S. 683. In *Sam Fox Publishing*, the Court held that members of an association "were not entitled to intervene as of right" in an action by the association for antitrust violations under the Sherman Act. *Id.* at 690. The Court reasoned, in reaching that decision, that the individual members were "not bound by the consent judgment in these proceedings." *Id.* at 689. Explaining why, the Court noted with approval its earlier decision under the Clayton Act in *United States v. Borden Co.*, 347 U.S. 514 (1954):

> It was there stated in clearest terms that "private and public actions were designed to be cumulative, not mutually exclusive." (*id.* 347 U.S. at 518), and, quoting from *United States v. Bendix Home Appliances, Inc.*, (DC NY) 10 F.R.D. 73, 77, "' . . . [T]he scheme of the statute is sharply to distinguish between Government suits, either criminal or civil, and private suits for injunctive relief or for treble damages. Different policy considerations govern each of these. They may proceed simultaneously or in disregard of each other.'" *Id.* 347 U.S. at 518, 519.

Sam Fox Publ'g Co., 366 U.S. at 689. This Court went on to say in *Borden* that the "Attorney General" is charged under section 15 of the Clayton Act, 15 U.S.C. § 25, "with the duty of instituting equity proceedings to prevent and restrain violations of certain of the anti-

trust laws." *Borden*, 347 U.S. at 518. Then again, the Court pointed out, "a private plaintiff may obtain injunctive relief" under section 16 of the Act, 15 U.S.C. § 26, "against such violations only on a showing of 'threatened loss or damage'; and this must be of a sort personal to the plaintiff." *Id* (citation omitted). In short,

> [t]he Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served. These private and public actions were designed to be cumulative, not mutually exclusive. S. Rep. No. 698, 63d Cong., 2d Sess., 42.

Id.

To summarize, the cases relied upon by the court below establish that the doctrine of res judicata cannot bar the government from enforcing separate, independent claims under the Voting Rights Act, the Sherman Act or the Clayton Act on behalf of a broader public interest. But the doctrine *does* apply in a case, such as the one here, where res judicata is interposed by a defendant to bar the government from representing the interests of a private party that has already settled those interests in prior litigation under the very same statutory provisions upon which the government sues.

Here, unlike the situations in *City of Richmond, Hathorn, East Baton Rouge Parish* and *Sam Fox Publishing*, the government has the very same interest as the private parties, such as the class of all Charter ESOP participants, who commence an action under section 502(a)(2) of ERISA as a representative of the plan for monetary recovery on behalf of the plan under section 409(a) of ERISA. This is why Congress stated that "the Secretary *or* . . . a participant, beneficiary or fiduciary" may commence an action under section 502(a)(2) to recover a plan's losses pursuant to section 409(a) of ERISA.

Each one has the very same interest—to represent the plan and to recover its losses as a representative of the plan. Indeed, this Court's decision in *Massachusetts Mutual Life Insurance Co. v. Russell* says so: "Inclusion of the Secretary of Labor [among the persons authorized to sue under section 502(a)(2)] is indicative of Congress' intent that [such] actions . . . be brought in a representative capacity on behalf of the plan as a whole." *Russell*, 473 U.S. at 142 n.9.

Of course, the Secretary also has independent authority under section 502(a)(5) of ERISA to act in the public interest by commencing an action "to enjoin any act or practice which violates any provision of this title, or . . . to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title . . . ." 29 U.S.C. § 1132(a)(5). Relying on that authority, the Secretary extracted a consent order from SCNB that permanently enjoins the Bank from serving as a fiduciary or service provider to the Charter ESOP and from acting as a discretionary trustee under certain other circumstances. R8-183. That order was never disputed below because it was entered pursuant to the Secretary's independent authority to obtain relief under section 502(a)(5) of ERISA, 29 U.S.C. § 1132(a)(5). That authority, borrowing from this Court's opinion in *Borden*, "[was] designed to be cumulative, not mutually exclusive" with the purely private right of recovery provided through sections 502(a)(2) and 409(a) of ERISA. *Borden*, 347 U.S. at 518.

But where the Secretary brings an action under section 502(a)(2) of ERISA to recover losses to the plan, as a representative of the plan, after the same plan has already settled its claim under section 502(a)(2) for those losses, that is quite another matter. In that situation, the plan, or its representatives who sue under section 502(a)(2) of ERISA, are required to serve "[a] copy of the complaint . . . upon the Secretary of Labor" and the

Secretary is entitled "in his discretion to intervene" in the private litigation. ERISA § 502(h), 29 U.S.C. § 1132(h). The court below incorrectly held that the Secretary always retains an independent right to commence a second section 502(a)(2) lawsuit for money damages on behalf of a private plan, even in the face of a settlement of the same claim by private participants under the same statutory provisions on behalf of the same plan. If that proposition were true, however, then Congress surely would not have deemed it mandatory to afford the Secretary timely notice of the private lawsuit so that she would have a timely opportunity to intervene as a matter of right in that lawsuit. Rather, by adopting section 502(h) of ERISA, and requiring that the Secretary receive notice of litigation by private parties and entitling the Secretary to intervene therein, Congress recognized that the Secretary, as well as plan participants, may equally and only bring an action under section 502(a)(2) of ERISA to recover assets on behalf of the plan pursuant to section 409(a) of ERISA, as representatives of the plan. In this circumstance, Congress made it abundantly clear that these parties have no interest other than as representatives of the plan.

The court of appeals disagreed and relied upon three cases that expressly address sections 409(a) and 502(a)(2) of ERISA, *Campbell v. Hall-Mark Electronics Corp.*, 808 F.2d 775 (11th Cir. 1987), *Donovan v. Cunningham*, 716 F.2d 1455 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984), and *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682 (7th Cir. 1986) (en banc). But these cases provide no real basis for the court's decision to abandon the doctrine of representative claim preclusion.

Campbell involved an appeal by the Secretary from an order by the district court denying her motion to intervene at the eleventh hour in an action by a class of plan participants under section 502(a)(2) of ERISA. The court of appeals affirmed the denial and, in explaining

why, left no doubt about the distinct character of a claim under section 502(a)(2) of ERISA for private pecuniary relief on behalf of the plan and a claim by the Secretary under section 502(a)(5) for broader equitable relief benefiting the public interest: "Possessing actual knowledge that the private parties were proceeding toward a settlement, the Secretary could not then bury his head in the sand and later claim that he was unaware of the potential adverse effect such a settlement might have on his own interests." *Campbell,* 808 F.2d at 777. Further, "[i]ntervention at this point would only jeopardize a legitimately negotiated, accepted, and approved settlement." *Id.* at 779. Finally—

> [t]he proposal provides a substantial monetary offer to all plan participants, the very people the Secretary seeks to protect. In addition, the Secretary *certainly may continue to litigate his own case in pursuit of whatever broader public policy interests he deems important.*

Id. (emphasis added).

The court in *Cunningham* identified the same distinction between claims for a purely private recovery on behalf of a pension plan under section 502(a)(2) of ERISA and claims by the government under section 502(a)(5) for broader equitable relief to protect the public interest at large. The Secretary in *Cunningham* brought an action against a number of fiduciaries of another ESOP to recover the ESOP's losses under sections 502(a)(2) and 409 of ERISA. The Secretary also "sought to enjoin the defendants from violating ERISA and from serving as fiduciaries under ERISA for five years" pursuant to section 502(a)(5) of ERISA. *Cunningham,* 716 F.2d at 1460. At about the same time, a number of the ESOP's participants filed a private action against the same fiduciaries to recover the same losses under, again, sections 502(a)(2) and 409(a) of ERISA.

The private action settled during the pendency of an appeal of the action by the Secretary of Labor.

Based on the private settlement, the fiduciaries argued on appeal that the Secretary's lawsuit—in its entirety—was barred by the doctrines of res judicata and mootness. The court of appeals rejected the blanket application of those doctrines because, in the court's words, "the settlement agreement did not render all relief sought by the Secretary either unnecessary or impossible to achieve." *Id.* at 1461. The court went on to point out that the—

> injunctive relief sought by the Secretary is not limited to actions affecting the Metropolitan ESOP. He [the Secretary] asks that if violations of ERISA are found, the appellees be enjoined from violating the statute in the future and, more specifically, that they be enjoined from serving as fiduciaries under *any* ERISA plan for a five-year period.

Id. at 1461. Consistent therewith, the court also rejected the assertion that all of the Secretary's claims are barred by the doctrine of res judicata. The *Cunningham* court noted that as a "general principle of law" the "United States will not be barred from independent litigation by the failure of a private plaintiff." *Id.* at 1462. Not surprisingly, the court went on to explain that "[t]his principle is based primarily upon the recognition that the United States has an interest in enforcing federal law that is independent of any claims of private citizens . . . ." *Id.* Explaining further, the court then noted that—

> [t]he cases that have developed this principle have often involved statutory schemes like ERISA that provide for private enforcement of individual rights as well as suits by the government to vindicate the public interest in compliance with the law. For example, in suits to enforce Section 5 of the Voting Rights Act, the Attorney General of the United States is not bound by the results of prior litigation of the same issues by private parties. *Hathorn v.*

> *Lovorn*, 457 U.S. 225, 268 n.23 (1982); . . . *City of Richmond v. United States*, 422 U.S. 358, 373 n.6 (1975); . . . *East Baton Rouge Parish, supra.*

Id. From this, the court asserted that—

> [a]s in those cases, the Secretary in the present case seeks to vindicate a public interest that is broader than the interests of the plaintiffs in the [class action]. Those plaintiffs were interested in recouping only their *own* economic losses; the Secretary seeks to determine the legality of specific conduct and to prevent those who have engaged in illegal activity from causing loss to *any* future ERISA plan participant. Thus, although the monetary settlement sought in the prior litigation may have achieved the goals of the private plaintiffs, it is clearly inadequate to vindicate the broader interest of the government.

Id. at 1462. Concluding, the court of appeals then cited a number of EEOC res judicata cases for the proposition that the prior private settlement would nonetheless affect "the scope of relief" available to the Secretary on remand. *Id.* at 1462 n.10.

In short, the court in *Cunningham* recognized that Congress authorized the Secretary to act in the broader interest of the public by exercising her equity powers under section 502(a)(5) of ERISA, 29 U.S.C. § 1132(a)(5). Where the Secretary does so, she is not precluded from exercising that power by a prior judgment obtained by a private party who sought to vindicate private rights. Nothing in the decisions in *Campbell* and *Cunningham* suggests otherwise. In fact, a careful reading of those cases indicates a recognition that, in the words of the court in *Cunningham*, "[t]he cases that have developed this principle [of a division between the public and private interest] have often involved statutory schemes like ERISA that provide for private enforcement of individual rights as well as suits by the government to vindicate the public interest in compliance with the law." *Cunningham*, 716 F.2d at 1462.

This case, however, raises a different circumstance involving a different provision of ERISA. Here, both the *Knop* Action participants and the Secretary commenced an action under section 502(a)(2) of ERISA to recover losses to the Charter ESOP pursuant to section 409(a) of ERISA. This Court has made it clear that when the Secretary and participants bring such an action, they *both* act in the interest of the plan as representatives of the plan. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. at 140. Indeed, citing this identity of interest, the Secretary asserted below that the attorney-client privilege could not be raised as a bar to her review of certain information obtained by SCNB because, like SCNB, she also is "acting on behalf and in the interests of the plan participants and beneficiaries." R7-142-Tab F.

Finding this acknowledgement somewhat uncomfortable, the court below turned to the decision of the Seventh Circuit in *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, and concluded that it describes a public interest component to section 502(a)(2) suits by the Secretary for money damages on behalf of a private plan. It is true that the Seventh Circuit stated in *Fitzsimmons* that "nothing in the statute [including, presumably, sections 502(a)(2) and 409(a)] equates the Secretary's interests with those of private litigants so as to justify the application of *res judicata* to bar the Secretary from bringing a separate claim where private litigation has begun or been concluded." *Id.* at 690. The defendant had apparently argued below that sections 502(a)(2) and 409(a) were an exception because those provisions authorized both the Secretary of Labor and private parties to commence an action on behalf of a plan to recover losses to the plan. The defendant had apparently further argued that this Court had made it perfectly clear in *Russell* that, when suing under those provisions, the Secretary of Labor and private parties were acting on behalf of the plan as plan representa-

tives. Responding to this argument, the Seventh Circuit stated that the "Supreme Court's decision in *Massachusetts Mut. Life Ins. Co. v. Russell*, . . . does not support a result contrary to that which we reach here." *Id.* at 691 n.12. However, the Seventh Circuit acknowledged that the Court in *Russell* had, in fact, noted that—

> [i]nclusion of the Secretary of Labor [as one of the four classes of plaintiffs] is indicative of Congress' intent that [such] actions . . . be brought in a representative capacity on behalf of the plan as a whole. Indeed, the common interest shared by all four classes [of plaintiffs] is in the financial integrity of the plan.

Id. (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. at 142 n.9). Nevertheless, without reason or reference, the Seventh Circuit announced, arbitrarily, that "[a] review of Section 502, [29 U.S.C. § 1132] reveals that this passing inference to a 'representative capacity' and the 'financial intgerity of the plan' must not be read as broadly as the defendants would have us believe." *Id.*[3]

In summary, because the court below agreed with this unexplained result, and ignored that the Secretary sues under section 502(a)(2) of ERISA to recover losses to the plan under section 409(a) of ERISA only as a representative of the plan who acts in the interests of the plan, the decision below is contrary to *Massachusetts Mutual*

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[3] It is unclear whether the Seventh Circuit continues to adhere to this view. The now-Chief Judge of the Seventh Circuit later expressed his view, in a subsequent case, that claims brought by the Secretary under section 502(a)(2) of ERISA should be subject to the same doctrines of equitable estoppel as claims brought by the EEOC to obtain monetary relief for the individual victims of unlawful employment discrimination: "They are the same kind of suit as this; they are suits on behalf of private individuals in which any damages collected in the suit are paid over to the individuals rather than retained by the agency." *Martin v. Consultants & Adm'rs, Inc.*, 966 F.2d 1078, 1100 (7th Cir. 1992) (Posner, J., concurring).

Life Insurance Co. v. Russell, 473 U.S. 134. For the same reason, the decision below is inconsistent with decisions of the First, Third, Fifth, Sixth and Ninth Circuits, as well as this Court's decision in *Schendel*, which recognize that the availability of two suits for a private monetary recovery, one by private individuals and another by the government, on behalf of an injured party, does not entitle the injured party to recovery both by the government and by private individuals. Rather, recovery by one bars, under the doctrine of *res judicata*, recovery by the other. Moreover, the decisions of this Court in *Hathorn*, *City of Richmond*, and *Sam Fox Publishing*, and of the Fifth Circuit in *East Baton Rouge Parish School Board*, are not to the contrary, and they provide the court below with no real support. Likewise, the Eleventh Circuit's decision in *Campbell*, and the Fifth Circuit's decision in *Cunningham*, merely endorse the uncontroverted fact that an independent claim by the Secretary for equitable relief is unaffected by a prior settlement of the injured plan's claim under section 502(a)(2) for monetary relief pursuant to section 409(a).

For all of these reasons, this Court should grant the petition for certiorari and decide on the merits that, as the dissent stated in *Fitzsimmons*, "in granting the Secretary enforcement powers in Section [502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2)] I believe Congress intended that the Secretary's interest be the same as that of the participants and beneficiaries who also had enforcement powers under [Section 502(a)(2), 29 U.S.C. § 1132 (a)(2)]." *Fitzsimmons*, 805 F.2d at 701 (Bauer, J., dissenting). And, for that reason, this Court should bar, under the doctrine of res judicata, the Secretary of Labor from subsequently recovering additional money damages on behalf of a plan under circumstances like these.

B. The Decision Below Threatens to Impede the Sound Administration of Justice by Undermining Private Parties' Incentives to Settle ERISA Claims.

Most civil ERISA claims are brought by private parties, not by the Secretary of Labor, and most of these claims settle short of trial. *See* Judicial Business of the United States Courts 1997 Report of the Director, Tables C-2, C-4. The decision of the court of appeals jeopardizes all such voluntary settlements. If the Secretary of Labor is not barred from bringing a second lawsuit to recover money damages on behalf of a settling plan, ERISA defendants will have the choice of (i) trying to join the Secretary in every private litigation, (ii) deferring any settlement until after the Secretary's statute of limitations runs, or (iii) simply reducing the settlement amount paid to the plan in order to account for the risk of later litigation brought by the Secretary. The first option is unpalatable for the Secretary and undesirable for the courts given the overwhelming number of ERISA cases. The latter two would hurt the private plans and participants whom the Secretary says she wants to help. Inevitably, the result is bad public policy, and one entirely foreign to our nation's legal system.

The law favors and encourages voluntary settlements. *Marek v. Chesny*, 473 U.S. 1, 10 (1985); *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910). The doctrines of res judicata and release help to accomplish that end by allowing the injured parties—here the plan through a court-certified class of all its participants—to sell complete peace in return for settlement dollars. In this respect, the doctrine of res judicata avoids "the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153-54 (1979). Applying the doctrines of res judicata and release in this circumstance is, in the words of this Court, "demanded by the very

object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement [here] is essential to the maintenance of social order . . . ." *Southern Pac. R.R. v. United States*, 168 U.S. 1, 49 (1897).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

TABLE OF CONTENTS

APPENDIX A: Page

Opinion of the United States Court of Appeals for the Eleventh Circuit in *Herman v. South Carolina National Bank, et al.*, 140 F.3d 1413 (11th Cir. 1998) 1a

APPENDIX B:

Memorandum Opinion of the United States District Court for the Northern District of Alabama in *Knop v. Charter Medical Corp.*, Nos. 91-L-1075, 92-L-1544-NE, 92-L-2858-NE (N.D. Ala. Nov. 4, 1996) 29a

APPENDIX C:

August 10, 1998 Order of the United States Court of Appeals for the Eleventh Circuit Denying the Petitions for Rehearing and the Suggestions for Rehearing En Banc in *Herman v. South Carolina National Bank, et al., supra.* 40a

APPENDIX D:

November 4, 1996 Order of the United States District Court for the Northern District of Alabama Dismissing the Secretary of Labor's Claims for Monetary Relief Against South Carolina National Bank in *Knop v. Charter Medical Corp., supra.* 43a

APPENDIX E:

January 15, 1997 Order of the United States District Court for the Northern District of Alabama Directing the Clerk to Enter Final Judgment in *Knop v. Charter Medical Corp., supra.* 46a

APPENDIX F:

Statutes Involved 48a

ERISA § 409(a), 29 U.S.C. § 1109(a) 48a

ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) .. 48a

ERISA § 502(a)(5), 29 U.S.C. § 1132(a)(5) .. 48a

ERISA § 502(h), 29 U.S.C. § 1132(h) 49a

APPENDIX A

[Filed May 15, 1998]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-6058

D.C. Docket No. CV-92-L-2858-NE
CV 91-L-1075-NE
CV 92-H-1544-NE

ALEXIS HERMAN,
Secretary of the United States Department of Labor,
Plaintiff-Appellant,
versus

SOUTH CAROLINA NATIONAL BANK;
WILLIAM A. FICKLING, JR., *et al.*,
Defendants-Appellees.

No. 97-6154

D.C. Docket No. CV-91-L-1075-NE
CV-92-H-1544-NE
CV-92-L-2858-NE

FRANCES J. KNOP; *et al.*,
Plaintiffs,
versus

CHARTER MEDICAL CORPORATION, *et al.*,
Defendants,

SOUTH CAROLINA NATIONAL BANK,
Defendant-Third Party
Plaintiff-Appellee,

versus

ALEXIS HERMAN,
Secretary of the United States Department of Labor, *et al.*,
Third Party Defendants-
Appellants.

SOUTH CAROLINA NATIONAL BANK,
Plaintiff-Appellee,

WILLIAM A. FICKLING, JR., *et al.*,
Intervenor-Plaintiffs-Appellees,

versus

ALEXIS HERMAN,
Secretary of the United States Department of Labor, *et al.*,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Alabama

(May 15, 1998)

Before EDMONDSON and HULL, Circuit Judges, and CLARK, Senior Circuit Judge.

HULL, Circuit Judge:

These three consolidated cases concern an ERISA trustee's paying $80 million from the assets of an em-

ployee stock ownership plan to purchase allegedly worthless stock from a closely held corporation's owner, his relatives, and related entities. Claiming ERISA expressly prohibits this stock purchase, the Secretary of Labor appeals the district court's grant of summary judgment to the plan's trustee and the stock sellers.[1] After review, we reverse.

I. FACTUAL BACKGROUND

A. *The Stock Purchase*

In 1990, South Carolina National Bank ("SCNB") was the trustee of the Charter Medical Corporation Employee Stock Ownership Plan ("the Plan"). Trustee SCNB paid $80 million from Plan assets to William A. Fickling, Jr., his relatives, and related entities (the "Ficklings") to purchase their common stock in Charter Medical Corporation ("Charter"). Mr. Fickling was the President and Chairman of the Board of Directors at Charter, a closely held corporation. The Secretary contends that the Ficklings, as "parties in interest" under ERISA § 3(14), and SCNB, as the Plan trustee, violated ERISA § 406 when SCNB paid $80 million in Plan assets, or more than adequate consideration, to purchase the Ficklings' essentially worthless Charter stock.

To avoid conflicts of interest and self-dealing, ERISA prohibits stock transactions between a "party in interest" and a plan trustee. Although employee stock ownership plans ("ESOPs") invest in their employers' securities and generally are exempt from this prohibition, the exemption applies only if the transaction is for "adequate consideration."[2] Before addressing further the Secretary's action

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[1] Alexis Herman, the current Labor Secretary, has been substituted for Lynn Martin, the Labor Secretary in 1992 who initially brought this action.

[2] An employee stock ownership plan is an ERISA plan that invests primarily in the employer's stock. 29 U.S.C. § 1107(d)(6)(A). See *infra* notes 10 and 20 for discussion of this ERISA prohibition

against SCNB and the Ficklings, we review the two other lawsuits about this stock purchase that became consolidated with the Secretary's action.

B. *Private Litigants' Lawsuit Against Charter, the Ficklings, and SCNB*

In 1991, private litigants brought a class action against Charter, the Ficklings, SCNB, and others (the "*Knop* action").[3] The plaintiff class consisted of the Plan's beneficiaries, who alleged violations of ERISA, federal securities laws, and state law in both this $80 million stock purchase in 1990 and an earlier $375 million stock purchase in 1988. The Secretary was not a party to the *Knop* class action.

In March 1992, the Secretary was advised that the private litigants were settling with all defendants. The Secretary responded that she was conducting her own investigation of the stock transactions and was not bound by the private litigants' settlement. The Secretary received the formal settlement documents on April 6, 1992. By this time, the Secretary's expert had advised that Charter's significant debt of one and one-half billion dollars and the stock valuation errors during the 1990 purchase made the stock essentially worthless. On April 9, 1992, the Secretary again advised the *Knop* parties that the Secretary was

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and exemption. Charter's stock was not publicly traded and had no established market price. The Secretary contends the parties improperly evaluated the impact of over one and one-half billion dollars in corporate debt on Charter's solvency and the value of its stock.

3 The three consolidated lawsuits are: (a) the Secretary's complaint in *Martin v. South Carolina Nat'l Bank, et al.*, No. CV-92-2858-NE (N.D. Ala. July 24, 1992) (transferred from M.D. Ga.); (b) SCNB's third party complaint against the Secretary in *Knop, et al. v. Charter Med. Corp, et al.*, No. 91-L-1075-NE (N.D. Ala. May 10, 1991) (third party complaint filed Aug. 18, 1992); and (c) SCNB's complaint against the Secretary in *South Carolina Nat'l Bank v. Martin*, No. 92-H-1544-NE (N.D. Ala. July 7, 1992).

continuing her investigation, may bring suit, and was not bound by the *Knop* settlement. None of the parties sought to join the Secretary in the *Knop* action.

At the *Knop* fairness hearing on April 30, 1992, the district court approved the settlement. Charter made a $12.3 million financial contribution to the settlement, but the Ficklings and SCNB did not contribute any money to the settlement.[4] Nonetheless, the private litigants dismissed with prejudice all claims against the Ficklings and SCNB. *Knop* counsel informed the district court that the Secretary had advised the parties that the Department of Labor "had no desire to impede the proposed settlement but that their silence should not be taken as restricting whatever they might do in the future."

C. *SCNB's Lawsuit Against the Secretary*

Immediately after the *Knop* settlement, SCNB filed a new lawsuit against the Secretary on July 7, 1992, and simultaneously moved in *Knop* to file a third party complaint against the Secretary.[5] Each case sought a declaration that the Secretary was in privity with the private *Knop* plaintiffs and that the *Knop* settlement precluded the Secretary from additional relief in any future lawsuit.

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[4] SCNB stresses that Charter funded the *Knop* settlement as part of Charter's agreement to indemnify SCNB. The Ficklings also contend that they contributed financially because: (a) as preferred shareholders they surrendered certain priority rights as part of a bankruptcy plan of reorganization that allowed the Plan to obtain some value for the allegedly worthless stock; and (b) they consented to less favorable allocation of common stock. The Secretary disputes this contention and argues that there is no evidence that these conditions resulted in a benefit to the Plan or a sacrifice by the Ficklings and that there is some evidence to suggest that the reverse is true. In any event, given the magnitude of the Plan's losses, these contributions were negligible.

[5] *See supra* note 3.

D. *Secretary's Lawsuit Against the Ficklings and SCNB*

On July 24, 1992, the Secretary filed her own action against the Ficklings and SCNB.[6] The Secretary did not sue Charter or any parties contributing monetarily to the *Knop* settlement, but sued only the Ficklings and SCNB, who paid nothing. The Secretary sought to recover from the Ficklings and SCNB $80 million (offset by sums already recovered), ERISA's statutory civil penalties, equitable relief for recission and disgorgement of profits, and injunctive relief.

E. *Three Lawsuits Consolidated*

In late 1992, the three lawsuits were consolidated because each involved whether the Secretary was bound by the private *Knop* settlement. In early 1993, the Ficklings and SCNB moved for summary judgment. In a June 25, 1993 order, the district court granted summary judgment for the Ficklings in a single sentence without analysis, citing only *Useden v. Acker*, 947 F.2d 1563 (11th Cir. 1991). However, as discussed *infra*, *Useden* supports, not defeats, the Secretary's claim against the Ficklings.

In contrast to the Ficklings' motion, the district court held in abeyance SCNB's motion for partial summary judgment and permitted discovery only on the narrow issue of whether SCNB had breached its fiduciary obligations. The Secretary was prohibited from conducting discovery on SCNB's claims of laches, res judicata, and release and other issues. In 1996, the district court granted SCNB's 1993 motion for partial summary judgment, finding that laches, res judicata, and release barred the Secretary's claims. The district court did not distinguish between the Secretary's legal claims for money damages, equitable claims for disgorgement of profits, or right to assess ERISA's civil penalties, but treated all as claims for monetary relief.

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[6] *See supra* note 3.

Subsequently, the Secretary and SCNB settled her claims for injunctive relief, making the case final.[7] The Secretary then appealed the district court's grant of summary judgment for the Ficklings and SCNB on the Secretary's remaining legal and equitable claims and right to assess civil penalties.[8]

II. ERISA § 406 PROHIBITS THIS STOCK TRANSACTION BETWEEN PLAN AND "PARTIES IN INTEREST"

We first examine the ERISA violation in issue. The Secretary alleges that the Ficklings are "parties in interest," as defined under ERISA § 3(14), and that they violated ERISA § 406 by engaging in a prohibited stock transaction with SCNB.

As alleged by the Secretary, ERISA § 406 does prohibit stock transactions between an ERISA plan and a "party in interest", as follows:

> A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—
>
> > (A) sale or exchange, or leasing, of any property *between the plan and a party in interest*;
> >
> > . . .
> >
> > (D) *transfer to*, or use by or for the benefit of, *a party in interest, of any assets of the plan*;
> >
> > . . .

29 U.S.C. § 1106(a)(1)(A), (D) (ERISA § 406(a)(1)(A),(D)) (emphasis supplied).

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[7] SCNB agreed not to serve as a trustee for any ERISA plan for three years or ever again for Charter's Plan.

[8] We review a district court's grant of summary judgment *de novo*. *Useden v. Acker*, 947 F.2d 1563, 1572 (11th Cir. 1991).

Also, the Ficklings may be considered "parties in interest" under a number of § 3(14)'s definitions.[9] ERISA § 3(14) defines a "party in interest" to include fiduciaries, plan employees, service providers, employers whose employees are covered by ERISA plans, employee organizations whose members are covered by a plan, and owners of 50% or more of stock in these employers and employee organizations, or a relative of such an owner. 29 U.S.C. § 1002(14) (ERISA § 3(14)). A "party in interest" also includes employees, officers, and directors, as well as shareholders, partners, and joint venturers owning ten percent or more of entities that are themselves "parties in interest." *Id.*

ERISA prohibits stock transactions between a plan and a "party in interest" because of the obvious conflicts of interest and the high potential for abuse and injury to the plan. *See* 29 U.S.C. § 1106(a)(1)(A),(D) (ERISA § 406(a)(1)(A),(D)). The Supreme Court noted that in enacting § 406(a) barring transactions between a "party in interest" and an ERISA plan, "Congress' goal was to bar categorically a transaction that was likely to injure the pension plan." *Commissioner v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993). It is clear that a stock transaction for more than adequate consideration betwen SCNB, as Plan trustee, and the Ficklings, as "parties in interest," violates § 406.[10] The parties mainly

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9 The district court's order, dated December 3, 1992, transferring the Secretary's action from Georgia to Alabama, made a finding that "Mr. Fickling was a 'party in interest' with respect to the ESOP under ERISA, as were his relatives and affiliated business entities." *Martin v. South Carolina Bank, et al.*, No. 92-298-1-MAC (DF), at 2 (M.D. Ga. Dec. 3, 1993). Subsequently, the district court in Alabama granted summary judgment to the Ficklings on a different basis, without completed discovery on, and without reaching, the "party in interest" issue. Thus, our analysis assumes *arguendo* that the Ficklings are "parties in interest" as the Secretary alleges. *See also infra* note 26.

10 Since an ESOP invests mainly in an employer's securities, ERISA § 408(e) exempts from § 406's prohibited transactions an

dispute whether the Secretary can sue the Ficklings as "parties in interest" for participating in that stock transaction prohibited by § 406 or only the fiduciary SCNB.

III. SECRETARY MAY SUE FICKLINGS FOR EQUITABLE RELIEF UNDER § 502(a)(5) FOR ACTS VIOLATING § 406

A. *Useden Distinguishes Suits Against Non-fiduciaries Under §§ 502(a)(2) and 409 From Suits Against Non-fiduciary "Parties in Interest" under §§ 502(a)(5) and 406*

The district court granted summary judgment to the Ficklings, citing only this court's decision in *Useden v. Acker*, 947 F.2d 1563 (11th Cir. 1991). *Useden* concerns breach of fiduciary duties under *§ 409* and holds that *non-fiduciaries* cannot be sued under § 502(a)(2) for *breaching fiduciary duties* under *§ 409*. However, *Useden* supports, not defeats, the Secretary's claim against the Ficklings as "parties in interest" under *§ 406* because *Useden* goes further and indicates that *§ 502(a)(5)* authorizes suits for equitable relief against *non-fiduciary "parties in interest"* whose *acts violate § 406* without restricting the type of party who may be sued. *See Useden*, 947 F.2d at 1581. Comparisons of § 409 versus § 406 and § 502(a)(2) versus § 502(a)(5), plus review of *Usedon*, readily reveal why the Secretary can sue the Ficklings here.

We begin with ERISA § 502(a), where Congress outlined who may bring civil actions and for what relief.

ESOP's acquisition of employer stock if (1) the acquisition is for "adequate consideration," and (2) no commission is charged with respect to the acquisition. 29 U.S.C. § 1108(e) (ERISA § 408(e)). The Secretary alleges that the § 408(e) exemption does not apply to the Plan's stock purchase because the Plan paid more than adequate consideration for the stock. The issue of whether the consideration was adequate was never resolved in the district court and is not before this court on appeal. Instead, the parties and the court have assumed *arguendo* for this appeal that SCNB paid more than adequate consideration for the allegedly worthless stock. *See infra* note 20.

A comparison of § 502(a)(2) with § 502(a)(5) follows:

> A civil action may be brought—
>
> . . .
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary *for appropriate relief under section [409]*; [11]
>
> . . .
>
> (5) . . . by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) *to obtain other appropriate equitable relief* (i) *to redress such violation* or (ii) to enforce any provision of this subchapter; . . .

29 U.S.C. § 1132(a)(2), (5) (ERISA § 502(a)(2), (5)) (emphasis supplied). Section 502(a)(5) authorizes the Secretary to obtain "appropriate equitable relief" to redress ERISA violations. While § 502(a)(5) limits the Secretary to only "equitable relief," § 502(a)(5) does not restrict "the types of parties who can be so sued." *Useden* 947 F.2d at 1581. Section 502(a)(5) does not restrict equitable relief to being against only fiduciaries.

In contrast, the Secretary may sue under § 502(a)(2), but only "for appropriate relief under section [409]." Section 502(a)(2), in effect, incorporates § 409, and thereby limits relief to that available under § 409. We thus turn to § 409, which provides that only *fiduciaries* "shall be personally liable" for breach of *fiduciary* duties, as follows:

> *Any person who is a fiduciary* with respect to a plan who breaches any of the responsibilities, obligations, or duties *imposed upon fiduciaries* by this subchapter *shall be personally liable* to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of *such fiduciary* which have been made through use of

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[11] 29 U.S.C. § 502(a)(2) refers to appropriate relief under § 1109 of Title 29, the codified version of § 409 of ERISA.

> assets of the plan *by the fiduciary*, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of *such fiduciary*.

28 U.S.C. § 1109(a) (ERISA § 409(a)) (emphasis supplied).

The *Useden* court read the terms of § 409 and § 502(a)(2), referencing § 409, as limiting relief to *fiduciaries* for breaches of *fiduciary* duties. *Useden* held that the defendants bank and attorneys, who had advised the former plan fiduciary trustee, were not liable for *breaches of fiduciary* duties under §§ 409 and 502(a)(2) because the bank and attorneys had not acquired *fiduciary status* in the financial transactions in issue. *Useden*, 947 F.2d at 1572-79.

Importantly for this case, *Useden* went further and pointed out significant differences between § 409 and § 406 and between § 502(a)(2) and § 502(a)(5). *Useden* first noted the absence of textual treatment of non-fiduciaries in § 409 and § 409's express language limiting personal liability to fiduciaries. *Useden* then contrasted that with § 3(14)(B)'s broad definition of "parties in interest with whom plans are prohibited to enter into certain transactions under section 406(a)" and § 502(a)(5)'s authorization of suit for equitable relief for "any act or practice" violating ERISA "without restricting the type of parties who may be sued." *Id.* at 1581. *Useden* summarized these important differences in these ERISA statutes, as follows:

> In the present case, appellant would have us ignore the obvious care with which ERISA's remedial provisions are formulated, instead requiring us to supplement the statute with a substantive right against a party that Congress readily could have chosen to reach. Congress clearly contemplated the involve-

> ment of non-fiduciary parties with employee benefit plans when it drafted provisions of ERISA. *For example, ERISA sections 502(a)(3) and 502(a)(5) authorize suits to enjoin or obtain other equitable relief for "any act or practice" violating either the statute or the terms of a plan, without restricting the types of parties who may be so sued. ERISA section 3(14)(B), moreover, broadly defines the "parties in interest" with whom plans are prohibited to enter into certain transactions under section 406(a).* Significantly, however, Congress expressly limited the scope of sections 502(a)(3) and 502(a)(5) to equitable remedies, and likewise limited section 409(a) to provide a right of action only against fiduciaries. It is telling that, *despite textual treatment of non-fiduciaries in various other parts of the ERISA scheme,* provisions [§§ 409 and 502(a)(2)] relevant to appellant's theory contain no textual support for a claim for monetary damages against non-fiduciaries. We cannot infer that Congress's silence is accidental in an area where Congress has already said so much out loud.

Id. at 1581-82 (citations omitted) (emphasis supplied). Construing first §§ 409 and 502(a)(2), *Useden* holds only that *non-fiduciaries* cannot be sued for *breach of fiduciary duties* because § 409 contains no references to non-fiduciaries and because Congress expressly limited liability in §§ 409 and 502(a)(2) to fiduciaries.

In reaching this holding, *Useden* then contrasts §§ 409 and 502(a)(2) with §§ 406 and 502(a)(5) and answers in dicta the very different question posed here regarding who can be sued for equitable relief under § 502(a)(5) for engaging in stock transactions prohibited by § 406. In short, who can the Secretary sue for acts that violate ERISA § 406? *Useden* directly points to a "party in interest" who participates in a prohibited transaction in

violation of § 406 as an example of a non-fiduciary against whom relief may be sought under § 502(a)(5). *Id.* at 1581. This is precisely the Secretary's claim against the Ficklings in this case.[12] In addition to pointing out ERISA's textual treatment of "parties in interest" in § 406, *Useden* goes further and concludes these "parties in interest" can be sued for equitable relief under § 502 (a)(5) because § 502(a)(5) does not restrict the type of parties who may be sued.

B. *Other Circuits Hold Non-fiduciary "Parties in Interest" May Be Sued for Violating § 406*

Similar to *Useden's* dicta, other circuit courts have held uniformly that an ERISA-defined "party in interest" like the Ficklings, may be sued for equitable relief under either § 502(a)(5) or § 502(a)(3) when that "party in interest" violates ERISA by engaging in transactions with fiduciaries prohibited by § 406. *See Reich v. Stangl*, 73 F.3d 1027 (10th Cir.), *cert. denied*, 117 S. Ct. 48 (1996) (§ 502(a)(5)); *Landwehr v. Dupree*, 72 F.3d 726 (9th Cir. 1995) (§ 502(a)(3)); *Reich v. Compton*, 57 F.3d 270 (3d Cir. 1995) (§ 502(a)(5)); *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988) (§ 502(a)(3)); *see also Reich v. Rowe*, 20 F.3d 25 (1st Cir. 1994) (§ 502(a)(5)). Where a fiduciary and a "party in interest" directly engage in a transaction that violates § 406, no circuit has limited relief under § 502(a)(5) to only the fiduciary.

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[12] In holding that a non-fiduciary cannot be sued for breach of fiduciary duties in *Reich v. Rowe*, 20 F.3d 25 (1st Cir. 1994), the First Circuit also compared § 409 against § 406 and contrasted actions against non-fiduciaries for participation in a fiduciary's breach with actions against non-fiduciary "parties in interest" for participation in prohibited transactions. The First Circuit concluded that "[a]lthough fiduciary breaches also violate ERISA, non-fiduciaries cannot, by definition, engage in the act or practice of breaching a fiduciary duty. Non-fiduciaries can, however, engage in the act or practice of transacting with an ERISA plan." *Id.* at 31 n.7.

Instead, reading §§ 502(a)(5) and 406 together, these circuits have held that the ERISA "party in interest" who benefitted from the impermissible transaction with the fiduciary is liable under ERISA for equitable relief and is required to disgorge ill-gotten assets from the ERISA plan.

We agree with the panel's dicta in *Useden* and other circuits addressing this same issue, and now hold that under §§ 502(a)(5) and 406 the Secretary may seek equitable relief from "parties in interest" to transactions prohibited by § 406. As *Useden* points out, § 502(a)(5) is aimed at such "act[s] or practice[s] violating [ERISA]" without restricting the types of parties who may be so sued." *Id.* at 1581.

C. *Supreme Court's Mertens*

The Ficklings emphasize that §406 begins, like § 409, with the term "fiduciary" and that § 406 provides that a fiduciary shall not cause the plan to enter into prohibited transactions with "parties in interest." The Ficklings argue that § 406 imposes a duty on only fiduciaries not to cause a plan to enter into transactions with "parties in interest," but does not prohibit a "party in interest" from entering into that same transaction with a fiduciary. This argument, however, ignores key differences in the statutory language of § 406 and § 409, plus the Supreme Court's recent decision in *Mertens* recognizing § 406's prohibition on "parties in interest" engaging in transactions with an ERISA plan.

First, as to the statutory language, § 409 provides that a fiduciary "shall be personally liable" for breaches of fiduciary duties. In contrast, § 406 does not address, much less limit, who shall be personally liable; instead § 406 prescribes the type of transactions that ERISA prohibits. While § 406 does instruct fiduciaries—typically the plan trustee—not to cause the plan to enter into transactions with "parties in interest," § 406 also serves to

prohibit transactions between a fiduciary and a "party in interest." Even if § 406 imposes an affirmative duty on fiduciaries not to cause the plan to enter into certain prohibited transactions, this in no sense lessens the fact that a transaction between a plan and a "party in interest" remains a prohibited transaction under § 406. *See Useden*, 947 F.2d at 1581-82; *Reich v. Stangl*, 73 F.3d 1207, 1030-31 (10th Cir. 1996); *Reich v. Rowe*, 20 F.3d 25, 31 n.7 (1st Cir. 1994); *Reich v. Compton*, 57 F.3d 270, 285-86 (3d Cir. 1995); *Nieto v. Ecker*, 845 F.2d 868, 873-74 (9th Cir. 1988).

Second, § 502(a)(2) limits the Secretary to only "appropriate relief under section [409]," and then § 409 limits personal liability to fiduciaries. In contrast, § 502(a)(5), as *Useden* recognizes, permits the Secretary to obtain equitable relief to address any act or practice that violates § 406 without restricting who may be sued. *See Useden*, 947 F.2d at 1581. As "parties in interest" to a prohibited transaction, the Ficklings engaged in an act or practice that violates ERISA. Section 502(a)(5) thus expressly authorizes the Secretary to obtain appropriate equitable relief from the Ficklings to redress that ERISA violation. While the Ficklings may not be subjected to legal claims for compensatory damages for joining in a fiduciary's breach under § 409, they may be liable as "parties in interest" for equitable disgorgement of their profits received from engaging in a prohibited transaction in violation of § 406.

More importantly, a recent Supreme Court decision supports *Useden*'s analysis of § 406. In *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 260-61 (1993), the Supreme Court acknowledged in dicta that non-fiduciaries may be sued and required under § 502(a)(5) to disgorge ill-gotten plan assets or profits obtained through participation in transactions prohibited by § 406. The Supreme Court explained that "the 'equitable relief' awardable un-

der § 502(a)(5) includes restitution of ill-gotton plan assets or profits. . . ." *Mertens*, 508 U.S. at 260. The Supreme Court held that non-fiduciaries may not be liable for the legal remedy of compensatory damages for breach of fiduciary duties because ERISA contains no provision requiring non-fiduciaries to avoid participation in a fiduciary's breach of fiduciary duty.

However, the Supreme Court also contrasted the lack of any ERISA provision regarding a non-fiduciary's participation in a fiduciary's breach with other ERISA provisions, such as § 406 "that can be read as imposing obligations upon nonfiduciaries. . . ." *Id.* at 253-54. As an example of a provision that imposes such an obligation, the Supreme Court cited § 406(a)'s prohibition on "parties in interest" offering services or engaging in other transactions with the plan. *Id.* at 254 n.4. The Supreme Court further stated that professional service providers "must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406, and pay related civil penalties or excise taxes . . . ." *Id* at 262 (citations omitted).

While *Mertens* involved service providers, the concept that "parties in interest" can be sued for disgorgement of profits for participating in a transaction prohibited by § 406 is no less applicable to other non-fiduciary "parties in interest," such as the Ficklings.[13] *See* 29 U.S.C. § 1002(14)(B) (ERISA § 3(14)(B)) (including service providers within the definition of "parties in interest"). Even though disgorgement of profits may produce money, *Mertens* makes it clear that disgorgement of profits is a distinctly equitable remedy different from the legal remedy

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[13] The Third and Tenth Circuits also found that the Supreme Court in *Mertens* implied that a non-fiduciary "party in interest" may be liable under § 502(a)(5) for participating in transactions prohibited by § 406. *Reich v. Compton*, 57 F.3d 270, 285 (3rd Cir. 1995); *Reich v. Stangl*, 73 F.3d 1027, 1032 (10th Cir. 1996).

of compensatory damages for breach of fiduciary duty. *See Mertens* 508 U.S. at 260. The Court's definition of appropriate equitable relief under § 502(a)(5) clearly encompasses the fruits of a prohibited transaction from "parties in interest" like the Ficklings.[14]

In sum, under § 502(a)(5), the Secretary may sue the Ficklings as "parties in interest" for equitable relief for engaging in a prohibited transaction with SCNB in violation of § 406. Therefore, the district court erred in granting summary judgment to the Ficklings.

IV. PRIVATE LITIGANTS' SETTLEMENT DOES NOT BAR SECRETARY'S ACTION

The Ficklings and SCNB next contend that the *Knop* private settlement bars the Secretary's action against them. This issue requires us to examine the Secretary's special statutory role in seeking relief and assessing civil penalties for ERISA violations.

A. *Secretary's Statutory Role*

In § 502(a), Congress granted the Secretary an independent and unqualified right to sue and seek redress for ERISA violations because ERISA plans significantly affect the "national public interest." ERISA itself contains a declaration of public purpose that recognizes that the economic impact of private benefit plans affects the "national public interest."[15] *See* 29 U.S.C. § 1001(a)

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[14] In *Lockheed Corp. v. Spink*, 517 U.S. 882, 116 S. Ct. 1783 (1996), the Supreme Court acknowledged that *Mertens*'s statements about § 406 were dicta, but declined to retreat from that dicta and stated again, albeit in dicta, that "a party in interest who benefitted from an impermissible transaction can be held liable under ERISA." *Id.* at 1789 n.3.

[15] ERISA's statement of purpose provides "that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is [sic] increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; *that they are*

(ERISA § 2(a)). Private ERISA litigants seek to redress individual grievances. However, in suing for ERISA violations, the Secretary seeks not only to recoup plan losses, but also to supervise enforcement of ERISA, to guarantee uniform compliance with ERISA, to expose and deter plan asset mismanagement, to protect federal revenues, to safeguard the enormous amount of assets and investments funded by ERISA plans, and to assess civil penalties for ERISA violations.

One circuit court succintly summarized the Secretary's national public interest in bringing ERISA actions as ensuring "the financial stability of billions of dollars of assets which in turn have a monumental effect on not only the Treasury of the United States, but on the national economy and commerce as well." *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 692 (7th Cir. 1986) (en banc). In addition to recovering plan losses, the Secretary "has an even stronger and paramount obligation to protect the very integrity, heart and lifeline of the program itself." *Id.* at 692-93.

ERISA's legislative history also emphasizes the Secretary's national public interest in deterrence, including the need for the Labor Department to have "broad authority to monitor employee benefit plans and deter violations of the law," and to "restructure its enforcement efforts to emphasize deterrence." H.Conf.Rep. No. 101-386, at 431-32 (1989), *reprinted in* 1989 U.S.C.C.A.N. 3018, 3035.[16]

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affected with a national public interest; . . . ." 29 U.S.C. § 1001(a) (ERISA § 2(a)) (emphasis supplied).

[16] In 1989, Congress expanded § 502 to confer additional enforcement powers upon the Secretary, including assessment of civil penalties against plan administrators, § 502(c)(2), "parties in interest," § 502(i), fiduciaries, § 502(*l*)(1)(A), (m), and, in some instances, against "any person," § 502(c)(4), (c)(5), (*l*)(1)(B). Omnibus Budget Reconciliation Act of 1989, Pub. L. 101-239, 103 Stat. 2123. These civil penalties go directly to the United States Treasury. While the Secretary must assess civil penalties, none of the contested issues about these civil penalties is presently before the court on appeal.

The congressional Conference Committee concluded that the Secretary must have and use enforcement powers and civil penalties to make ERISA meaningful, as follows:

> [I]t has become apparent that the Department must use its enforcement powers more vigorously to make the protection of ERISA meaningful. The conferees believe strengthened civil penalties will better enable the Department to protect participants and beneficiaries. The conferees further believe that the need for strengthened enforcement and deterrence of violations of ERISA applies not only to the Department of Labor, but to judicial oversight of private rights of actions affecting employee benefit plans. It remains the intent of Congress that the courts use their power to fashion legal and equitable remedies that not only protect participants and beneficiaries but deter violations of the law as well.

Id. at 3035-36. Against this statutory background, we examine why the private litigants' settlement in *Knop* does not bar the Secretary' s action here.

B. *Res Judicata*

The district court incorrectly held that the private litigants' settlement barred the Secretary's claims under the doctrine of res judicata or claim preclusion.[17] This doctrine does not apply unless "the parties to both actions, or those in privity with them, are identical." *Richardson v. Alabama State Bd. of Educ.*, 935 F.2d 1240, 1244 (11th Cir. 1991); *see also Hart v. Yamaha-Parts Distributs., Inc.*, 787 F.2d 1468, 1471-72 (11th Cir. 1986). This

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[17] Application of res judicata presents questions of law reviewed *de novo*. *Richardson v. Miller*, 101 F.3d 665, 667-68 (11th Cir. 1996); *Riddle v. Cero Wire & Cable Group, Inc.*, 902 F.2d 918, 921-22 (11th Cir. 1990). For the same reasons that res judicata principles do not apply in this case, the *Knop* plaintiffs could not release the Secretary's claims against the defendants.

circuit has held that " '[a] nonparty to a prior decision cannot be bound by it unless he had sufficient identity of interest with a party that his interests are deemed to have been litigated.' " *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492, 1498 (11th Cir. 1987) *aff'd sub nom. Martin v. Wilks*, 490 U.S. 755 (1989) (quoting *Wilson v. Attaway*, 757 F.2d 1227, 1237 (11th Cir. 1985)). The doctrine does not apply here because the Secretary was not a party to the *Knop* settlement and has national public interests separate and distinct from those of the *Knop* private litigants.

Every circuit addressing the issue has held that the Secretary is not bound by prior private litigation when the Secretary files an independent action to address ERISA violations. *See, e.g., Beck v. Levering*, 947 F.2d 639, 642 (2d Cir. 1991), *cert. denied sub nom., Levy v. Martin*, 504 U.S. 909 (1992); *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 690-94 (7th Cir. 1986); *Donovan v. Cunningham*, 716 F.2d 1455, 1462-63 (5th Cir. 1983); *see also Brock v. Gilliken*, 677 F. Supp. 398, 402 (E.D.N.C. 1987). Each court recognized that the Secretary's national public interests in bringing an ERISA enforcement action are wholly distinct and separate from those of private litigants who seek to redress individual grievances or recoup plan losses for their personal benefit as plan beneficiaries. *See, e.g., Fitzsimmons*, 805 F.2d at 693-94. The courts note that under ERISA's statutory framework private plaintiffs do not adequately represent, and are not charged with representing, the broader national public interests represented by the Secretary.[18]

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[18] The district court cited footnote 9 in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985) for the proposition that the Secretary sues only in a representative capacity. However, *Russell*'s footnote 9 addressed only actions under § 502(a)(2) for breach of fiduciary duties under § 409. *Russell* did not involve res judicata or a Secretary's claim under § 502(a)(5) for equitable relief against "parties in interest" participatng in a prohibited transacton in violation of § 406. *Russell* also points out that § 502

A previous ERISA decision from this circuit foreshadows our similar conclusion that the *Knop* private settlement does not bar the Secretary's action here. In *Campbell v. Hall-Mark Electronics Corp.*, 808 F.2d 775 (11th Cir. 1987), this court affirmed a denial of the Secretary's motion to intervene to oppose a plan participants' class action settlement. This court noted that the Secretary's interests were not prejudiced significantly by the settlement because "the Secretary certainly may continue to litigate his own case in pursuit of whatever broader public policy interests he deems important." *Id.* at 779. *Campbell* recognized that the Secretary has an independent right to sue. A corollary to *Campbell* is that a private litigation settlement does not preclude the Secretary's separate action.

Similar to this case, the Secretary's main objection to the private settlement in the Seventh Circuit's *Fitzsimmons* decision was that the private "recovery was wholly inadequate in light of the number and dollar amount of the claims against the former trustees and also that the settlement agreement failed to allow recovery from the personal assets of the former trustees." *Fitzsimmons*, 805 F.2d at 686. After extensive review of ERISA's statutory framework and purposes, the Seventh Circuit en banc held directly that the private settlement did not bar the Secretary's independent right to sue. *Id.* at 694.[19]

(a)(2) "authorizes suits by four classes of party-plaintiffs: the Secretary of Labor, participants, beneficiaries, and fiduciaries." 473 U.S. at 142 n.9. In contrast, ERISA separates the Secretary's right to sue for ERISA violations in § 502(a)(5) from the participant's, beneficiary's, and fiduciary's right to sue for ERISA violations in § 502(a)(3).

[19] Appellees quote selective statements from *Fitzsimmons* and argue that a private setlement limits the Secretary to only injunctive relief, even if the Secretary can sue independently. *Fitzsimmons*'s discussion about the separate interest of the Secretary in obtaining injunctive relief is only one of the many examples of the Secretary's separate interests discussed in *Fitzsimmons*. The Seventh Circuit also discusses the Secretary's separate legal interests

These ERISA cases are consistent with the well-established general principle that the government is not bound by private litigation when the government's action seeks to enforce a federal statute that implicates both public and private interests. *See Hathorn v. Lovorn*, 457 U.S. 255, 268 n.23 (1982); *City of Richmond v. United States*, 422 U.S. 358, 373 n.6 (1975); *Sam Fox Publ'g. Co., Inc. v. United States*, 366 U.S. 683, 689-90 (1961); *United States v. East Baton Rouge Parish Sch. Bd.*, 594 F.2d 56, 58 (5th Cir. 1979). In *East Baton Rouge Parish School Board*, this court also recognized this general principle that a private plaintiff's prior litigation does not bar the government's action, stating:

> [T]he district court's conclusion [that the private plaintiffs and the United States were identical] is directly contrary to the general principle of law that the United States will not be barred from independent litigation by the failure of a private plaintiff. This principle is based primarily upon the recognition that the United States has an interest in enforcing federal law that is independent of any claims of private citizens. In the present context the Supreme Court has characterized this as "the highest public interest in the due observance of all constitutional guarantees." Also, any contrary rule would impose an onerous and extensive burden upon the United States to monitor private litigation in order to ensure that possible mishandling of a claim by a private plaintiff could be corrected by intervention.

East Baton Rouge Parish Sch. Bd., 594 F.2d at 58 (quoting in part *United States v. Raines*, 362 U.S. 17 (1960) (citations omitted)).

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in protecting a plan's financial stability in obtaining disgorgement of illegal profits, in preventing unjust enrichment, in restoring plan assets, in protecting beneficiaries' incomes, and in deterring future ERISA violations, all of which implicate monetary recoveries. (The civil penalties, enacted in 1989, were not in effect when *Fitzsimmons* was decided.)

Subsequently, the Fifth Circuit directly applied this same principle to an ERISA case similar to this one, *Donovan v. Cunningham,* 716 F.2d 1455, 1462-63 (5th Cir. 1983). In *Donovan,* an ESOP trustee allegedly had paid more than adequate consideration for the stock of the company's president.[20] The Fifth Circuit concluded that the Secretary's interest was different from private plaintiffs' interests and, thus, the Secretary was not precluded from bringing an independent action for ERISA violations. *Id.*[21]

The ERISA enforcement scheme, carefully constructed by Congress, is undermined if private litigants can sue ERISA violators first, reach a settlement, and bar the Secretary's action. The terms of the *Knop* private settlement illustrate why this result is not what Congress intended, or provided, in ERISA. The *Knop* settlement recovered from Charter only a small fraction of the Plan's $80 million in assets lost in the stock purchase. The private plaintiffs released and dismissed with prejudice both SCNB and the Ficklings despite having alleged serious ERISA violations against them and even though they

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[20] The Fifth Circuit held that the "adequate consideration" exemption in ERISA § 408 was not applicable and thus the stock transaction was prohibited by ERISA § 406. *Donovan* discusses at length the mechanics of ESOPs, the duties of ESOP fiduciaries under ERISA, and the nature of the inadequate consideration exemption in ERISA § 408. *See generally Donovan v. Cunningham,* 716 F.2d 1455 (5th Cir. 1983); *see also supra* note 10.

[21] Appellees contend *Donovan* supports their defense that the Secretary's independent action is limited to injunctive relief. We disagree. *Donovan's* discussion of injunctive relief concerned only whether the Secretary's action was moot because the private parties dissolved the ESOP as part of their settlement. In fact, the *Donovan* court noted that whether the Secretary's equitable claim for disgorgement was barred was not addressed by the district court and remanded that issue because "the parties have not adequately addressed the issues raised by these remedial arguments in the special context of ERISA." *Donovan,* 716 F.2d at 1462-63 & n.10.

made a negligible contribution to the settlement. Since only the Secretary can assess civil penalties, none were paid.[22]

While private plaintiffs understandably may be willing to compromise claims to gain prompt and definitive relief, the *Knop* settlement does not further the broader national public interests represented by the Secretary and reflected in Congress's delegation of ERISA enforcement powers to the Secretary. The national public interest in deterrence of asset mismanagement suffers if private parties can release claims against ERISA violators for negligible financial recovery and thereby immunize plan trustees and "parties in interest" from ERISA violations. Furthermore, the public treasury is ill-served by denying the Secretary

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22 Defendants rely heavily on EEOC cases from other circuits that preclude the EEOC from recovering monetary relief for private individuals who already have settled in their own name. However, this circuit has recognized that the interests of the EEOC and private litigants at times "are not necessarily compatible," and "are not always identical." *Riddle v. Cerro Wire & Cable Group, Inc.*, 902 F.2d 918, 922-23 (11th Cir. 1990) (holding private litigant's Title VII claims not barred by EEOC's settled suit). *Riddle* concluded that although the EEOC is able to recover damages for back pay and benefits, the EEOC is primarily interested in preventing employment discrimination in the workplace; whereas, the aggrieved individual is more interested in "specific personal relief" in her private action. *Id.* at 922-23.

Defendants' reliance on EEOC cases also ignores the different statutory enforcement schemes of Title VII and the ADEA, which reflect Congress's intent to limit multiple suits. Title VII and the ADEA require a private plaintiff to file a discrimination charge with the EEOC before suing. 42 U.S.C. § 2000e-5(b), (e), and (f); 29 U.S.C. § 626(d). The ADEA also terminates a private plaintiff's right of action under the ADEA upon "commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter." 29 U.S.C. § 626(c)(1). In contrast, ERISA gives plan beneficiaries and the Secretary independent rights of action, does not require private plaintiffs to file charges with the Secretary before suing, and nowhere forecloses private actions after the Secretary files suit, or, the Secretary's suit after a private action commences.

the opportunity to assess civil penalties, expressly authorized by Congress to deter ERISA violations, as well as the occasion to ensure that the Plan receives full value for the millions of dollars in tax subsidies.

C. *ERISA § 502(h)*

The district court emphasized that ERISA § 502(h) requires private litigants to serve their complaint on the Secretary and gives the Secretary discretion to intervene. *See* 29 U.S.C. § 1132(h) (ERISA § 502(h)). The purpose of § 502(h) is to provide the Secretary notice of ongoing lawsuits. *See Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 691 (7th Cir. 1986) (en banc). In § 502(h) Congress gave the Secretary discretion to intervene, but chose not to require the Secretary to do so. As the Seventh Circuit noted, Congress "never mandated that the Secretary must intervene in each and every piece of litigation or forever be barred by the doctrine of res judicata." *Id.* As this court previously recognized, "[t]he courts should not jam judicially created doctrines such as res judicata into the gears of Congress' carefully crafted statutory machinery." *United States v. Barnette*, 10 F.3d 1553, 1561 (11th Cir. 1994).

Given the volume of cases the Department of Labor monitors, courts recognize that it is unreasonable and unwise to require the Secretary to intervene in every ERISA action or be precluded.[23] *See, e.g., Donovan v. Cunningham*, 716 F.2d 1455, 1462 (5th Cir. 1983) (stating that to bar Secretary's ERISA action as a result of pri-

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[23] In 1989, the congressional Conference Committee, reporting on the civil penalties in § 502(*l*) noted that the Department of Labor was responsible for approximately 5.5 million employee benefit plans holding $2 trillion in assets and that the Department's resources had not kept pace with the growing importance of the benefits to the public, the expanding amount of plan assets, or the increasing number of plans. H.R. Conf. Rep. No. 101-386, at 432 (1989), *reprinted in* 1989 U.S.C.C.A.N. 3029, 3035.

vate settlement "would impose an onerous and extensive burden upon the United States to monitor private litigation in order to ensure that possible mishandling of a claim by a private plaintiff could be corrected by intervention"). Likewise, we decline to mandate judicially that the Secretary must intervene or be barred because this would frustrate Congress's express decision to leave intervention to the Secretary's "discretion" in § 502(h) and would permit defendants violating ERISA to settle quickly with private plaintiffs and defeat the Secretary's enforcement powers granted by Congress.

F. *Laches*

The district court also incorrectly held that the doctine of laches precluded the Secretary's action against SCNB. "It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights." *United States v. Summerlin*, 310 U.S. 414, 416 (1940); *United States v. Fernon*, 640 F.2d 609, 613 (5th Cir. Unit B Mar. 1981) (following *Summerlin*). This principle protects public rights vested in the government for the benefit of all from "the inadvertence of the agents upon which the government must necessarily rely." *United States v. Alvarado*, 5 F.3d 1425, 1427 (11th Cir. 1992); *see also United States v. Arrow Transp. Co.*, 658 F.2d 392, 394-95 (5th Cir. Unit B Oct. 1981) ("Although the fact situation describes a textbook case of laches, that defense cannot be asserted against the United States in its sovereign capacity to enforce a public right or to protect the public interest.").

To overcome this accepted rule, the district court relied upon Title VII cases. However, this circuit permits laches to bar an EEOC suit only because Title VII contains no statute of limitations. *See e.g., EEOC v. Dresser Indus., Inc.*, 668 F.2d 1199, 1201-02 (11th Cir. 1982) ("Laches is an equitable doctrine designed to prevent unfairness to

a defendant due to a plaintiff's delay in filing suit *in the absence of an appropriate statute of limitations.*") (emphasis supplied); *see also EEOC v. Vucitech*, 842 F.2d 936, 942 (7th Cir. 1988); *Boone v. Mechanical Specialties Co.*, 609 F.2d 956, 959 (9th Cir. 1979); *EEOC v. Liberty Loan Corp.*, 584 F.2d 853, 856 (8th Cir. 1978). In contrast, ERISA contains a detailed statute of limitations for actions regarding certain fiduciary breaches and ERISA violations. The Secretary filed her lawsuit within the time permitted by ERISA.[24] The rationale in EEOC suits for departing from the accepted rule is not present here.[25] Given the Supreme Court's mandate that the judiciary not tamper with ERISA's enforcement scheme, *Massachusetts Mut. Life Ins. v. Russell*, 473 U.S. 134, 147 (1985), and our circuit's recognition of the importance of ERISA's time lines, *Brock v. Nellis*, 809 F.2d 783, 784 (11th Cir. 1987), the district court erred in extending the laches exception in Title VII to ERISA actions. *See Reich v. Valley Nat'l Bank of Arizona*, 837 F. Supp. 1289, 1308-09 (S.D.N.Y. 1993); *First Bank Sys., Inc. v. Martin*, 783 F. Supp. 425, 426-27 (D. Minn. 1991); *Donovan v. Schmouter*, 592 F. Supp. 1361, 1403 (D. Nev. 1984).

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[24] Congress has specified the limitations period for a variety of circumstances, providing that an ERISA plaintiff must sue within six years from the last breach or violation, within three years from the date of actual knowledge of a breach or violation, or, in the case of fraud or concealment, within six years from the date of discovery of the breach or violation. 29 U.S.C. § 1113 (ERISA § 413). Allowing the federal government, in effect, to be estopped frustrates federal statutes and infringes upon Congress's exclusive authority to make law.

[25] Neither the district court nor the defendants cite any authority grafting the EEOC exception onto ERISA. Defendants do cite *Martin v. Consultants & Adm'rs, Inc.*, 966 F.2d 1078 (7th Cir. 1992), but the majority in *Martin* pretermitted deciding whether laches applied by finding "the elements of laches have not been met in the case before us." 966 F.2d at 1091. *But see* 966 F.2d at 1100 (Posner, J., concurring).

V. CONCLUSION

In conclusion, the *Knop* private settlement does not bar the Secretary's independent right to sue under ERISA in this case. Accordingly, the district court erred in granting summary judgment in favor of the defendants SCNB and the Ficklings. The Secretary's action may proceed against SCNB as a fiduciary for legal and equitable relief and civil penalties. The Secretary's action may proceed against the Ficklings as "parties in interest" for civil penalties and equitable relief, including but not limited to disgorgement of profits, recission, and restitution of Plan losses.[26]

Given our declaration that the Secretary's action may proceed, SCNB's third-party complaint seeking declatory judgment in the *Knop* action and SCNB's separate declatory judgment action are now resolved by this appeal. The court directs that judgment on the declatory judgment issue be entered in favor of the Secretary.

For the above reasons, we REVERSE the district court's orders granting summary judgment and VACATE the final judgments entered in favor of the defendants SCNB and the Ficklings. The action is REMANDED for further proceedings consistent with this opinion.

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[26] When the case returns to the district court, each party should be allowed to complete discovery, including on whether each of the Fickling defendants is a "party in interest" under ERISA § 406. Also, the Ficklings argue that the Secretary should not be able to rely on § 3(14)(H) as to certain Fickling defendants because the Secretary referred to only § 3(14)(G), (E), and (F) as to those particular persons or entities. However, the Secretary's allegation, that the Ficklings are "parties in interest" under § 3(14) engaging in a transaction prohibited under § 406, was more than sufficient to put the Ficklings on notice of the Secretary's claims. Any failure to specify each and every sub-subsection of § 3(14) as to each and every person is immaterial.

APPENDIX B

[Filed Nov. 6, 1996]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CV 91-L-1075-NE
(Consolidated)

FRANCIS J. KNOP and MILLIE SMITH,
Plaintiffs,

vs.

CHARTER MEDICAL CORPORATION, *et al.*,
Defendants.

SOUTH CAROLINA NATIONAL BANK,
Third-party plaintiff,

vs.

JAMES B. DAHER, *et al.*,
Third-party defendants.

CV 92-L-1544-NE
(Consolidated)

SOUTH CAROLINA NATIONAL BANK,
Plaintiff,

vs.

ROBERT REICH,
Secretary of Labor, U.S. Department of Labor,
Defendant.

CV 92-L-2858-NE
(Consolidated)

ROBERT REICH,
Secretary of the United States Department of Labor,
Plaintiff,

vs.

SOUTH CAROLINA NATIONAL BANK, *et al.*,
Defendants.

MEMORANDUM OPINION

South Carolina National Bank ("SCNB") has filed a motion for partial summary judgment as to the representative claims for monetary relief asserted by the Secretary of Labor ("Secretary"). This court concludes that the Secretary's representative claims for pecuniary relief are precluded under each of the three doctrines of laches, res judicata, and release.

I.

On May 10, 1991, two participants in the Charter Medical Corporation ("Charter") employee stock ownership plan ("ESOP") filed a complaint with this court on behalf of an alleged class of all participants in the ESOP. The participants claimed that various fiduciaries of the ESOP—including Charter (the employer), William A. Fickling, Jr. (Charter's founder who sold stock to the ESOP), Interstate/Johnson Lane Corporation (the financial adviser hired to price the Charter stock purchased by the ESOP) and SCNB (the trustee of the ESOP)—had violated ERISA by causing the ESOP to pay too much for the Charter stock purchased by the ESOP in 1990. On March 27, 1992, the participants signed an extensive settlement agreement with all the defendants. That same day, this court entered an order certifying a class that included all the ESOP participants. This court

directed the parties to notify all the class members and the Secretary of the proposed settlement, and this court scheduled a hearing for April 30, 1992. At that hearing, this court received comments from individual participants, but the Secretary chose not to appear. This court entered an order approving the settlement agreement. The settlement included the following benefits to the ESOP and its participants and beneficiaries:

1) $30 million in loan forgiveness of the $70 million debt owed by the ESOP on the loan from the 1990 transaction;

2) $40 million in accelerated contributions (subject to certain conditions) by Charter to the ESOP in connection with the $70 million debt owed for the 1990 transaction;

3) a new retirement plan (the "New Plan") established by Charter under Internal Revenue Code § 401(k) as a subplan of the ESOP, permitting deferred compensation to eligible employees under § 401(k); and

4) over $12.3 million in contributions from Charter to the New Plan, and certain direct payments to be paid between July 1, 1992, and January 2, 1996.

Six weeks later, on June 19, 1992, the Secretary wrote SCNB and demanded that SCNB pay $80 million to the ESOP, rescind the 1990 transaction, and consent to further injunctive relief to bar SCNB from serving in the future as a fiduciary to any ERISA plan. SCNB responded by filing a complaint to enforce the class action settlement against the Secretary. Two weeks later, the Secretary filed suit in the United States District Court for the Middle District of Georgia, despite the fact that in the settlement order this court had retained continuing jurisdiction over all matters relating to the settlement.

SCNB filed a motion to transfer the Georgia action to this court, and the motion was granted. This court subsequently consolidated the Secretary's action with the earlier class action and with SCNB's complaint against the Secretary.

After an opportunity for discovery, SCNB filed a motion for partial summary judgment as to the Secretary's claims for monetary relief. Before a ruling was entered on said motion, the Secretary and SCNB by letter dated January 29, 1996, submitted a proposed statement of issues to be set for trial and a plan for additional discovery on those issues. In addition, in this letter, the Secretary and SCNB jointly invited the court to explore with the parties the possibility of reaching an overall settlement of this litigation.

After the additional discovery, the court convened several settlement conferences as requested by the parties. The court emphasizes that at these conferences the attorneys operated in the highest tradition of civility. Despite the efforts of the court and the parties, no settlement was reached. As earlier indicated, now this court grants SCNB's motion for partial summary judgment as to the Secretary's representative claims for monetary relief on behalf of the Charter ESOP.

II.

In his First Amended Complaint, the Secretary alleges (1) that SCNB violated its fiduciary duties under ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), when the ESOP acquired Charter common stock on February 15, 1990, and (2) that SCNB caused the ESOP to enter into a transaction prohibited by ERISA § 1106(a)(1), 29 U.S.C. § 1106(a)(1), by allowing the ESOP to pay more than "adequate consideration," as defined in ERISA § 3(18), 29 U.S.C. § 1002 (18), when the ESOP acquired Charter common stock on February 15, 1990. Accordingly, the

Secretary's Complaint seeks to recover the same alleged losses on behalf of the same ESOP under the same section of ERISA and based on the same stock purchase as the participants sought and settled in the earlier class action.

The Secretary asserts claims for relief against SCNB pursuant to ERISA §§ 502(a)(2) and (5), 29 U.S.C. § 1132(a)(2) & (5). Secretary's First Amended Complaint ¶ 5. Section 502(a)(2) authorizes the Secretary to bring suit in a representative capacity on behalf of a plan against a fiduciary for appropriate relief under ERISA § 409, 29 U.S.C. § 1109. *See Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134, 142 n.9 (1985) (explaining that Congress intended for § 502(a)(2) actions to "be brought in a representative capacity on behalf of the plan as a whole.") Section 502(a)(5) authorizes the Secretary to obtain injunctive relief and "other appropriate equitable relief" to redress violations of certain ERISA provisions. *See Mertens v. Hewitt Associates,* 508 U.S. 248, 260-61 (1993) (only equitable relief, not monetary damages, available under § 502(a)(5)).

III.

Each of the three doctrines of laches, res judicata, and release separately precludes the Secretary's representative claims for pecuniary relief.

A. Laches

The doctrine of laches bars relief for those who delay in asserting their claims for an unreasonable time. *See EEOC v. Dresser Indus., Inc.,* 668 F.2d 1199 (11th Cir. 1982) (holding that representative claims brought by the EEOC on behalf of private victims of discrimination can be barred by laches). As in *Dresser,* here the Secretary is making a representative claim for monetary relief on behalf of private persons. *See Martin v. Consultants & Administrators, Inc.,* 866 F.2d 1078, 1100

(7th Cir. 1992) (Posner, J., concurring) ("[Suits by the EEOC] are the same kind of suit as this; they are suits on behalf of private individuals in which any damages collected in the suit are paid over to the individuals rather than retained by the agency."). Thus, in order for laches to apply, this court must find both that the plaintiff delayed inexcusably in bringing the suit and that this delay unduly prejudiced the defendant. *Dresser,* 668 F.2d at 1202.

The Secretary concedes that he received all of the information and documents upon which his present claims are based long before the class action settlement fairness hearing, that his hired expert had explained the alleged deficiencies in the 1990 transaction more than a month before that hearing, and that he received a full set of the settlement documents a month in advance of their approval by this court. (Aff. of Messina ¶ 12; Aff. of Beaver ¶¶ 9, 11; Aff. of Schloss ¶¶ 12-13, 17). By that time, the Secretary had been investigating the Charter ESOP for two full years and had reviewed and been given the opportunity to review and copy every contemporaneous document SCNB had referable to the 1990 transaction.

Despite this notice, the Secretary chose not to appear at the April 30, 1992, hearing nor to advise the parties or this court of the Secretary's opinion that additional monetary relief for the class action plaintiffs was warranted. Instead, in his April 9, 1992, letter to the parties, the Secretary stated that he was not a party to the settlement agreement and thus did not consider himself bound by its terms. The Secretary added, however, that he did not wish to make the chances of "settling" the action any less likely.

The Secretary's having intentionally waived every opportunity to appear or to advise the court and parties of his opinions, the court and parties were led to reasonably

rely on his waiver as allowing the settlement to resolve finally all claims that might be brought on behalf of the ESOP. Accordingly, based in no small part on the reticence of the Secretary to express any substantive dissatisfaction with the settlement, this court approved the settlement agreement.

Included in the settlement was SCNB's release of all other persons from liability in this matter. The failure of the Secretary to express his dissatisfaction with the class action settlement agreement caused SCNB to continue to agree to and proceed to final judgment with the settlement, and thus to be bound by a release of other persons. These other persons include Mr. Fickling, who received proceeds from the ESOP for his Charter stock, and Interstate/Johnson Lane Corporation, who set the allegedly excessive price for Charter stock. SCNB never would have continued to support the settlement if it had known of the Secretary's imminent plans to proceed against SNCB in an alternate forum. Therefore, the Secretary's inexcusable delay unduly prejudiced SCNB. Thus, these undisputed facts are all that are needed to establish the defense of laches.

B. Res Judicata

Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating claims that were or could have been raised in that action. *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Montana v. United States*, 440 U.S. 147, 153 (1979); *Manning v. City of Auburn*, 953 F.2d 1355, 1358 (11th Cir. 1992). The doctrine of res judicata applies where there is (1) a final judgment on the merits; (2) rendered by a court of competent jurisdiction; (3) with the same cause of action presented in both suits; and (4) with substantial identity of parties. *Manning*, 953 F.2d at 1358. In this case, all four requirements are met, and thus res judicata applies.

First, a final judgment exists, because a consent decree or a settlement has the same preclusive effect as a judgment. *See Richardson v. Alabama State Bd. of Ed.*, 935 F.2d 1240, 1244 (11th Cir. 1991). Second, there is no dispute that this court had jurisdiction to resolve the claims asserted in the class action.

Third, the same cause of action is presented in both suits. The claims by the participants and the claims by the Secretary both allege that SCNB violated ERISA in connection with the 1990 stock purchase made on behalf of the ESOP. Further, the Secretary's § 502(a)(2) claim for pecuniary relief under ERISA § 409 is the same claim as the participants' § 502(a)(2) claim under ERISA § 409 for pecuniary relief, which was settled in the class action.

Fourth, there is substantial identity of the parties. As conceded at oral argument, the Secretary's sole basis for claiming monetary relief for the ESOP from SCNB is under ERISA § 502(a)(2). (Transcript, June 22, 1993, pp. 41-46; *see* First Amended Complaint, p. 10, ¶ 3 (only seeking restitution from defendants other than SCNB)). In the class action, the participants already recovered pecuniary relief for the ESOP under § 502(a)(2). As the Supreme Court has explained, § 502(a)(2) claims are brought in a representative capacity only. *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985). A plan, such as the Charter ESOP, has substantial identity with itself, regardless of whether its § 502(a)(2) representative is the Secretary or was participants. *See Chicago, Rock Island & Pacific Railway Co. v. Schendel*, 270 U.S. 611, 619 (1926) (holding that the government "ought not be permitted to renew the controversy in the name of a merely nominal plaintiff, and thereby avoid the effect of former adjudication"). Thus, res judicata applies to preclude the Secretary's claims for monetary relief.[1]

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[1] To be sure, different considerations might normally apply to the Secretary's claims for appropriate equitable relief under ERISA

C. Release

A release bars relitigation of those claims encompassed by the release by or on behalf of those persons covered by the release. *See United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). The class action settlement included a release of all claims for relief on behalf of the Charter ESOP and its participants and beneficiaries. In making a claim for monetary relief, the Secretary is attempting to bestow a pecuniary windfall upon the ESOP and thus the participants and beneficiaries of the ESOP. Because the ESOP and its participants and beneficiaries have already released any further claim for monetary relief, subsequent pecuniary relief is barred.

IV.

ERISA § 502(h), 29 U.S.C. § 1132(h), provides that the Secretary shall receive a copy of any complaint brought under ERISA (other than one for benefits owed), and that the Secretary shall then have the right to inter-

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§ 502(a)(5). The Secretary alone is authorized to sue under that section. Equitable relief barring a fiduciary from taking certain actions in the future arguably can serve to vindicate a broader public interest in preventing violations of the law. *See Donovan v. Cunningham*, 716 F.2d 1455, 1461-62 & n.10 (5th Cir. 1983) (noting that a prior private settlement might not bar Secretary's claims for equitable relief), *cert. denied*, 467 U.S. 1251 (1984); *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 691-92 & n.12 (7th Cir. 1986) (en banc) (same). As such, the doctrine of res judicata might not preclude the Secretary's separate claims for appropriate equitable relief under ERISA § 502(a)(5). *See Brink v. DaLesio*, 88 F.R.D. 610, 613 (D.Md. 1980) (Secretary's tardy intervention in private participant's ERISA action denied, but denial "does not prevent the Secretary from filing an independent action to protect *any interests that have not been adjudicated in the present action*") (emphasis added), *modified in part on other grounds*, 667 F.2d 420 (4th Cir. 1981). This court is not now deciding whether such claims should or should not be nonetheless barred under the unique circumstances presented by this case.

vene. If the Secretary chooses not to intervene in the pending action, the Secretary knowingly risks the principles of laches, res judicata, and release precluding him from seeking the same relief in a later action. Indeed, the logical purposes for the Congressional grant of the Secretary's statutory right of intervention would be avoiding inappropriate preclusion of the Secretary by private parties and avoiding relitigation of the same claims for relief in two separate lawsuits.

In this case, not only was the Secretary provided a copy of the complaint, but he also knew that all affected ESOP participants and beneficiaries had chosen to settle for themselves all claims for monetary relief for their benefit; that this court was carefully scrutinizing a comprehensive class action settlement to ensure that the interests of all affected plan participants and beneficiaries were duly taken into account; and that each and every affected participant and beneficiary had received actual notice of the proposed settlement and an opportunity to object to it. Worse, the Secretary admittedly received advance notice of the settlement documents and fairness hearing at a time when the Secretary had in his possession not only his expert's present opinion, but the documents upon which that opinion and the Secretary's present claims for monetary relief are based. Despite all of this, the Secretary artfully remained silent rather than question the sufficiency, adequacy or fairness of the class action settlement before it was approved by the court; made no objection to the express release by SCNB, by the ESOP, and by the class of participants and beneficiaries of all claims for additional damages or other relief on their behalf; and took no action to advise the court or the parties of his position that additional monetary relief to the Charter ESOP and thus the class members was warranted. Instead, the Secretary deliberately avoided the statutory right of intervention that Congress has granted him, because he wanted to bring a second lawsuit seeking the

same relief in another forum a few weeks after the settlement was approved.

In granting the motion to transfer the Secretary's claim from Georgia, Judge Fitzpatrick observed:

> [I]f potential plaintiffs, plaintiffs who are represented by competent counsel and have a class certified and it is litigated—or at least negotiated—to a settlement approved by a United States District Court, that ought to end the matter, [and] the government should not be allowed to come in [afterward] merely because it feels the settlement was wrong or too low. . .

(Transcript of October 26, 1992, Hearing, pp. 39-42).

Congress conferred upon the Secretary the right to intervene. In an action affecting an ERISA plan and its beneficiaries, this court is charged with the responsibility of determining the consequences of the Secretary's deliberate and calculated refusal to exercise his right to intervene herein. This court believes that under the totality of the undisputed facts, the Secretary should be precluded as a matter of law and of equity from asserting a second claim seeking identical pecuniary relief.

Done this the 4th day of November 1996.

/s/ Seybourne H. Lynne
Senior Judge

APPENDIX C

[Filed Aug. 10, 1998]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97-6058

D. C. Docket No. CV-92-2858-NE

ALEXIS HERMAN,
Secretary of the United States Department of Labor,
Plaintiff-Appellant,

versus

SOUTH CAROLINA NATIONAL BANK; CHARTER MEDICAL CORPORATION EMPLOYEE STOCK OWNERSHIP PLAN; WILLIAM A. FICKLING, JR.; BANK SOUTH OF MACON, Trustee under Agreement of William A. Fickling, Jr., Self-Employed Retirement Plan; NEVA L. FICKLING, *et al.*,

Defendants-Appellees.

No. 97-6154

D.C. Docket No. CV-91-L-1075-NE (lead case)

FRANCES J. KNOP; MILLIE SMITH,
Plaintiffs,

versus

CHARTER MEDICAL CORPORATION, *et al.*,
Defendants,

SOUTH CAROLINA NATIONAL BANK,
Defendant-Cross-Claimant-Third Party Plaintiff-Appellee,

WILLIAM A. FICKLING, JR.;
J & R CAPITAL COMPANY, LTD.;
W & J CAPITAL COMPANY, LTD.;
Defendant-Third Party Plaintiffs-Appellees,

STANLEY S. TROTMAN,
Defendant-Cross-Defendant,

J. RODNEY LAUGHLIN; JAMES D. DAHER,
Third Party Defendants,

NEVA L. FICKLING; WILLIAM A. FICKLING, III, *et al.*,
Movants-Third Party Plaintiffs-Appellees,

ALEXIS HERMAN,
Secretary of the United States Department of Labor;
DEPARTMENT OF LABOR,
Third Party Defendants-Appellants.

D.C. Docket No. CV-92-L-1544-NE

SOUTH CAROLINA NATIONAL BANK,
Plaintiff-Appellee,

WILLIAM A. FICKLING, JR.;
J & R CAPITAL COMPANY;
W & J CAPITAL COMPANY;
NEVA L. FICKLING, *et al.*,
Intervenor-Plaintiffs-Appellees,

versus

ALEXIS HERMAN,
Secretary of the United States Department of Labor,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: EDMONSON and HULL, Circuit Judges, and CLARK, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Hull
United States Circuit Judge

APPENDIX D

[Filed Nov. 6, 1996]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CV 91-L-1075-NE
(Consolidated)

FRANCIS J. KNOP and MILLIE SMITH,
Plaintiffs,

vs.

CHARTER MEDICAL CORPORATION, *et al.*,
Defendants.

SOUTH CAROLINA NATIONAL BANK,
Third-party plaintiff,

vs.

JAMES D. DAHER, *et al.*,
Third-party defendants.

CV 92-L-1544-NE
(Consolidated)

SOUTH CAROLINA NATIONAL BANK,
Plaintiff,

vs.

ROBERT REICH,
SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR,
Defendant.

CV 92-L-2858-NE
(Consolidated)

ROBERT REICH,
Secretary of the United States Department of Labor,
Plaintiff,

vs.

SOUTH CAROLINA NATIONAL BANK, *et al.*,
Defendants.

PARTIAL SUMMARY JUDGMENT

This cause came on to be heard upon cross-motions for summary judgment filed by the Secretary of Labor (the "Secretary") and filed by Wachovia Bank of South Carolina, N.A. (formerly known as South Carolina National Bank) ("SCNB"). Upon consideration of SCNB's motion for partial summary judgment, the evidentiary submissions in support thereof and in opposition thereto, the pleadings, and the arguments of counsel, it appears to the court that there is no genuine issue of material fact and that SCNB is entitled to judgment as a matter of law as to the Secretary's claims for monetary relief. Accordingly, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. All claims of the Secretary of Labor for monetary relief against SCNB are hereby DISMISSED with prejudice, including without limitation all claims asserted under ERISA § 502(a)(2);

2. This Order does not adjudicate any of the Secretary's claims for non-monetary relief against SCNB under ERISA § 502(a)(5), or any of the Secretary's claims against any other party for any relief, monetary or non-monetary;

3. The Secretary's pending motion again seeking further discovery under Fed. R. Civ. P. 56(f) is hereby

OVERRULED for the same reasons expressed in other orders of this court; and

4. The Secretary's pending motion seeking additional expert discovery is DENIED as untimely.

Done this 4th day of November 1996.

/s/ Seybourn H. Lynne
Senior Judge

APPENDIX E

[Filed Jan. 15, 1997]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CV 91-L-1075-NE
(Consolidated)

FRANCIS J. KNOP and MILLIE SMITH,
Plaintiffs,

vs.

CHARTER MEDICAL CORPORATION, *et al.*,
Defendants.

SOUTH CAROLINA NATIONAL BANK,
Third-party plaintiff,

vs.

JAMES D. DAHER, *et al.*,
Third-party defendants.

CV 92-L-1544-NE
(Consolidated)

SOUTH CAROLINA NATIONAL BANK,
Plaintiff,

vs.

ROBERT REICH,
SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR,
Defendant.

CV 92-L-2858-NE
(Consolidated)

ROBERT REICH,
Secretary of the United States Department of Labor,
Plaintiff,

vs.

SOUTH CAROLINA NATIONAL BANK, *et al.*,
Defendants.

ORDER

An order was entered on November 13, 1996 by the court in *Reich v. South Carolina National Bank*, CV 92-L-2858-NE (one of the three consolidated cases captioned above). Such order is amended to direct the clerk to enter judgment pursuant to Fed. R. Civ. P. 58.

DONE this 15th day of January 1997.

/s/ Seybourn H. Lynne
Senior Judge

APPENDIX F

STATUTES INVOLVED

ERISA § 409(a), 29 U.S.C. § 1109(a)

Sec. 409. **(a)** Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of § 411 of this Act [29 U.S.C. § 1111].

ERISA § 502(a)(2) and (5), 29 U.S.C. § 1132(a)(2), (5)

Sec. 502. **(a)** A civil action may be brought—

* * * *

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under § 409 [29 U.S.C. § 1109];

* * * *

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title;

ERISA § 502(h), 29 U.S.C. § 1132(h)

A copy of the complaint in any action under this title by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.